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1
              IN THE UNITED STATES DISTRICT COURT
               FOR THE EASTERN DISTRICT OF TEXAS
2
                        MARSHALL DIVISION
3
   FUNCTION MEDIA, LLC
                                    Civil Docket No.
                                    2:07-CV-279
4
  VS.
                                    Marshall, Texas
5
                                    January 21, 2010
   GOOGLE, INC.
                                    8:30 A.M.
6
                    TRANSCRIPT OF JURY TRIAL
 7
              BEFORE THE HONORABLE CHAD EVERINGHAM
                 UNITED STATES MAGISTRATE JUDGE
8
9
   APPEARANCES:
10
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                           903/935-3868
   (Proceedings recorded by mechanical stenography,
   transcript produced on CAT system.)
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1	
2	APPEARANCES CONTINUED:
3	FOR THE DEFENDANTS: MR. CHARLES VERHOEVEN
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8	51 Madison Avenue 22nd Floor
9	New York, NY 10010
10	MR. HARRY L. GILLAM Gillam & Smith
11	303 South Washington Avenue Marshall, TX 75670
12	<u>PROCEEDINGS</u>
13	
14	COURT SECURITY OFFICER: All rise.
15	(Jury in.)
16	THE COURT: All right. Thank you.
17	Please be seated.
18	Pick up with the direct examination of
19	Mr. Bratic where we left off.
20	MR. NELSON: Yes, sir.
21	WALTER BRATIC, PLAINTIFF'S WITNESS, PREVIOUSLY SWORN
22	DIRECT EXAMINATION (CONTINUED)
23	BY MR. NELSON:
24	Q. Good morning.
25	A. Good morning.

Q. When we last left, we were discussing benefits that publishers received that is not part of Google's profits, and I want to be clear on something so that there's no confusion here.

You understand there's no allegation that the publishers infringe or practice this patent, right?

A. Yes.

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- Q. Okay. So you're only testifying about the benefits that they would receive that are in addition to Google's profits here, right?
- 11 A. Correct.
- Q. Okay. Was -- the benefit to publishers, was that a factor in your determination of the royalty rate?
- 14 A. Yes.
  - Q. How did that factor one way or the other?
  - A. Well, it factored in, because I have to look at -- as Georgia-Pacific says, one of the
- 18 Georgia-Pacific factors is you have to look at the
- 19 benefits to all those who -- you know, who have
- 20 benefitted from the patent.
  - And you've got the benefits to Google from practicing the patent and generating the ad revenues and generating profits from those, and then you have the publishers who benefit, because Google pays them significant sums of money for the ads that are placed on

their websites that aren't generating revenue otherwise. 1 2 Now, Mr. Bratic, are you aware of Google's 3 argument that the royalty here -- excuse me -- that the royalty here is too large because it's approximately 5 two-thirds of Google's profits? Yes, I was here when that argument was made. 6 7 Does Google's argument account for the Q. benefits that Google has apart from purely its profit 9 statement? 10 MR. VERHOEVEN: Objection, leading. THE COURT: Sustained. 11 (By Mr. Nelson) What other benefits does 12 Q. 13 Google have besides just the pure profit? 14 Well, Google's able to leverage off its other 15 There was a clip yesterday, a video clip, for example, in the morning, I believe, where it talked 16 about Google's other business interests that don't 17 18 generate revenues but benefit from products like 19 AdSense.

20 Q. Okay.

24

25

21 MR. NELSON: Let's please put up 22 Plaintiff's Exhibit 1696 and let's go to the strategic 2.3 benefits.

Q. (By Mr. Nelson) What are we looking at here, Mr. Bratic?

```
A. Well, this is an example of -- this is, again,
1
2
  an internal Google document. It talks about why AdSense
3
  is strategic to Google.
             And one of the benefits, it says, from a
4
5
  strategic perspective, it builds a stronger Google ad
  network.
6
        Q. Mr. Bratic, are you aware of whether
  senior-level Google executives have recognized the fact
  that there are benefits to Google besides a pure profit
10
  statement?
                  MR. VERHOEVEN: Objection, form, leading.
11
12
                  THE COURT: Overruled.
13
             I'm sorry. Could you repeat that?
        Α.
14
             (By Mr. Nelson) Yes.
        Ο.
15
             Are you aware one way or the other whether
  Google's senior-level executives have recognized these
16
17
  benefits to Google aside from its pure profit?
18
        A. Yes.
19
                  MR. NELSON: Let's go to Plaintiff's
20
  Exhibit 549.
21
           (By Mr. Nelson) And, Mr. Bratic, what are we
   looking at here?
22
            This is an e-mail from Brian Axe at Google,
2.3
24
  and he's talking about Content Ads. And it's -- again,
25
  it's an internal e-mail from March of 2003, which is
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- about or shortly before the launch of AdSense for Content Online.
  - Q. Okay.
- 4 MR. NELSON: Let's go to Page 3 of this.
- 5 Q. (By Mr. Nelson) Okay. Who is L.P.?
  - A. Larry Page, one of the co-founders of Google.
- Q. Okay. And what is Mr. Page saying about this
- 8 market?

1

2

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14

- A. Well, he's saying that the market for small companies is way too conservative. In other words, at this time, Google was preparing projections about the market for AdSense for Content. And he was commenting here that the market for these companies is way too
- Q. Okay. And who is E.S.?
- A. E.S. is Eric Schmidt, who is the Chief
- 17 Executive Officer of the company, and he's pointing out
- 18 realizing how big the gross revenue is for this
- 19 business.

conservative.

- Q. Are you aware, Mr. Bratic, of whether
- 21 Mr. Schmidt has ever made any other comments about the
- 22 importance of revenue to Google wholly apart from
- 23 profits?
- 24 A. Yes. You know, there are things called
- 25 investor calls where -- or analyst calls where the

- executives, like Mr. Schmidt, would get on a conference call with industry analysts and investment analyst people that follow the stock of Google and so forth, and he has made comments to them in public that the most important thing to Google is revenue.
  - Q. Are you aware of how the Securities and Exchange Commission of the federal government requires Google to report these payments?
- 9 A. Well, yes. Google is required to report -10 report the monies it receives from its advertising
  11 revenue as revenue.
- Q. Did Google ever try to convince the Securities and Exchange Commission that it did not have to report these payments as revenue?
- 15 A. Yes.

6

16

17

22

- Q. And what did the Securities and Exchange Commission conclude?
- A. The Securities and Exchange Commission

  concluded that Google has to report its advertising

  revenue that it generates from the publisher websites as

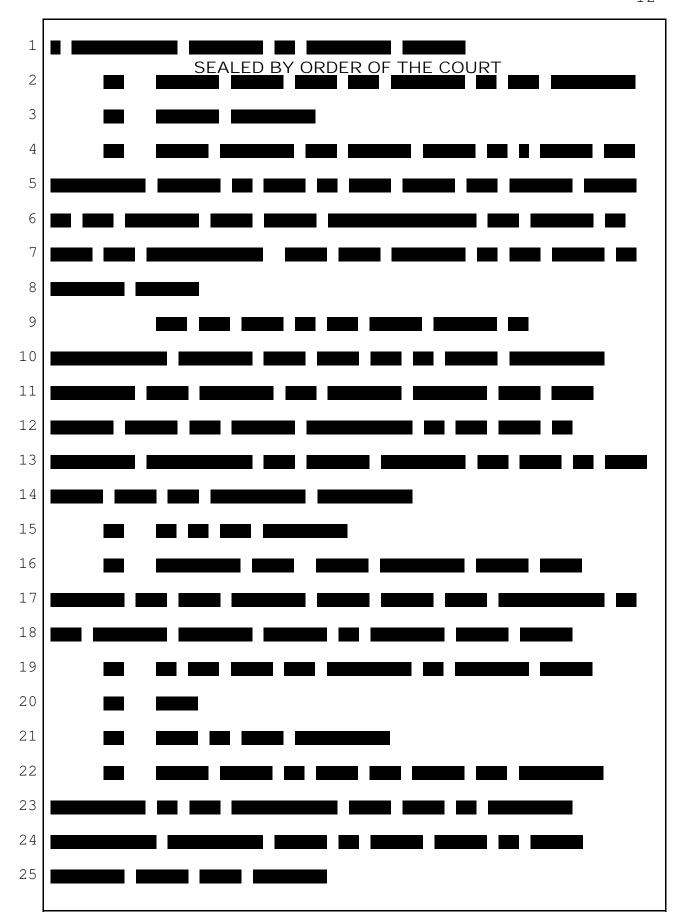
  revenue to Google.
  - Q. Okay.
- MR. NELSON: Let's please go to
- 24 Plaintiff's Exhibit 370.
- Oh, excuse me. Before we get off this

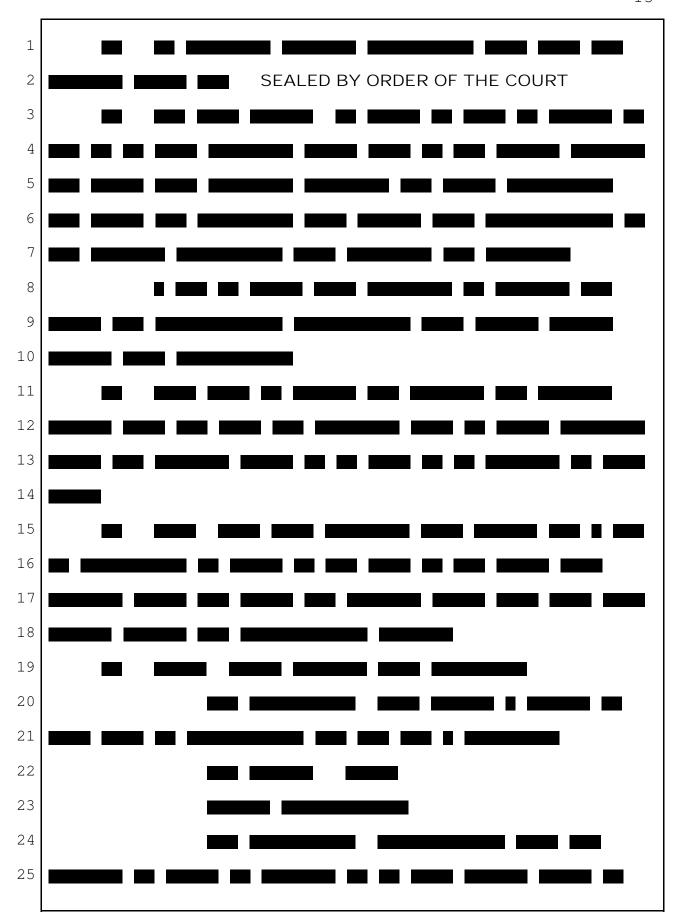
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one, let's go to the next page.
1
2
            (By Mr. Nelson) And up at the top, you see it
3
   says S.B.?
        Α.
4
            Yes.
5
            Who is S.B.?
        Q.
             That's Sergey Brin, I believe.
6
             Okay. And what does S.B. say about the
        Q..
  benefits that this product will have to the rest of
  Google's business?
            Well, in the first line, it says gross
10
  revenue, 150 million at the end of this year. So he's
11
  talking about upon the launch of AdSense for Content
12
13
  Online, it's going to generate $150 million by the end
14
  of the first year.
15
             And he goes on to say this does not factor in
16
  that it will have benefits to the rest of the business.
17
  In other words, that 150 million of revenues won't
  reflect all the benefits to the company. There's more
19
  benefits that just aren't expressed in dollars and
20
  cents.
21
            Okay. Have you seen any other documents that
22
   express that Google values gross revenue wholly apart
23
  from any profit?
24
        Α.
            Okay.
25
        Q.
            Okay.
```

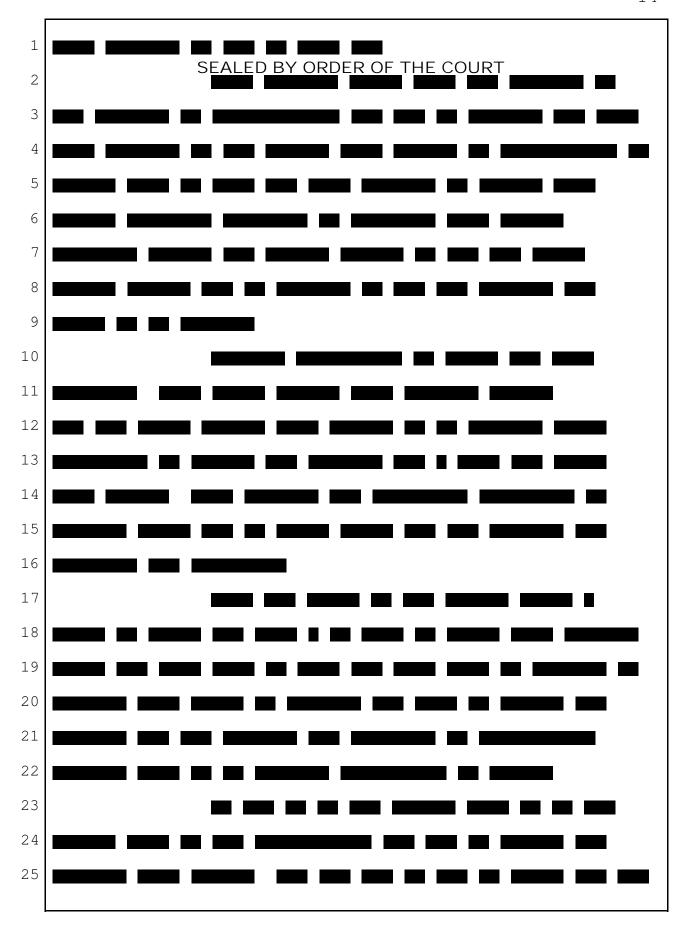
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MR. NELSON: Please let's go to
1
   Plaintiff's Exhibit 375.
2
3
        Α.
             375?
4
             (By Mr. Nelson) Yes. And it's Page 671 of
5
   that document.
        Α.
             Sorry. 375. Okay.
6
7
                  MR. NELSON: 6 -- 671, Matt.
8
             (By Mr. Nelson) Okay. What does it say here,
        Q.
9
   Mr. Bratic?
10
            Well, first of all, this is another Google
   internal document. And it says: Gross revenue is an
11
   important measure of our business since it drives many
12
13
   of our costs and is a key indicator of the value we
14
  create for our partners.
15
             Partners here would be the publisher partners.
16
             Okay. How does that affect your analysis?
        Q.
17
             Well, it's just part of the fact that Google
        Α.
   recognizes that revenues on these ad placement of these
19
   ads is very important to Google, and that there are
20
   other benefits to Google that aren't reflected in those
21
   revenue numbers they take in.
22
        Q.
                    Thank you.
             Okay.
2.3
                  MR. NELSON:
                               May we approach, Your Honor?
                  THE COURT:
24
                               Yes.
25
                  (Bench conference.)
```

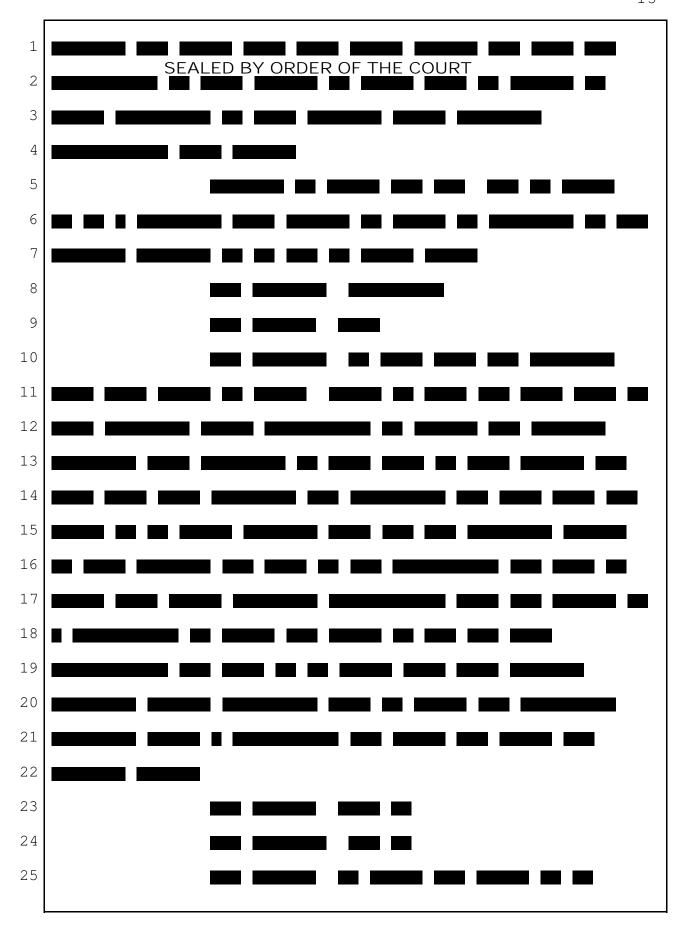
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1
                  THE COURT: Excuse me just a second.
 2
  was going to accomplish one other thing at this bench
 3
   conference that dealt with the two documents that you
   asked --
 4
 5
                  MR. NELSON: Oh, yes, sir.
                  THE COURT: And I don't have the numbers
 6
   written down. If you could go and retrieve those, I'll
   go ahead -- I'm going to allow you to use one and not
   the other, but I'll do it for purposes of the record at
10
   this time, if you want me to.
11
                  MR. NELSON: Yes, sir.
12
                  THE COURT: But I know what you're
13
   approaching me about.
14
                  MR. NELSON: Yes.
15
                  THE COURT: To go ahead and close the
16
   courtroom.
17
                  MR. NELSON: Yes.
18
                  THE COURT: But I wanted to take care of
19
   that here at the bench, too.
20
                  MR. NELSON: I can do it by memory. 1656
21
   is what you did not allow them to use.
22
                  THE COURT: Okay. I'm sustaining that
23
   objection.
24
                  MR. NELSON: 1659 is what he can use.
25
                  THE COURT: Okay. The objection was it
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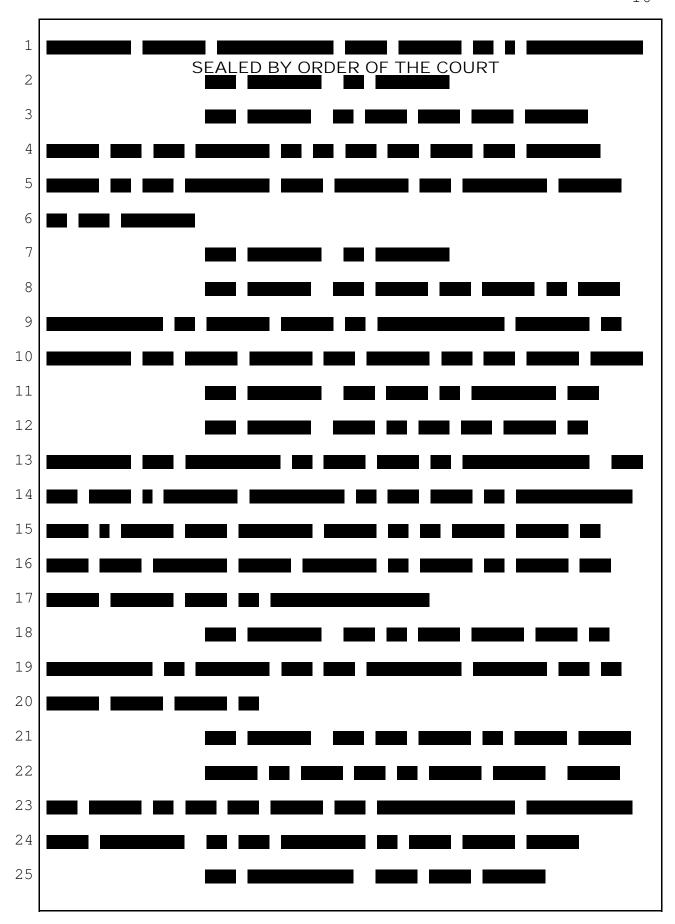
was not timely included in his report, and I'm going to overrule that objection based on the timing of the production when the document was produced, okay? (Bench conference concluded.) THE COURT: Folks back in the audience, we've got another issue with highly confidential information that I need to take up at this time. going to have to ask you to exit the courtroom. we did yesterday, I'll invite you back in as quickly as I can. SEALED BY ORDER OF THE COURT 

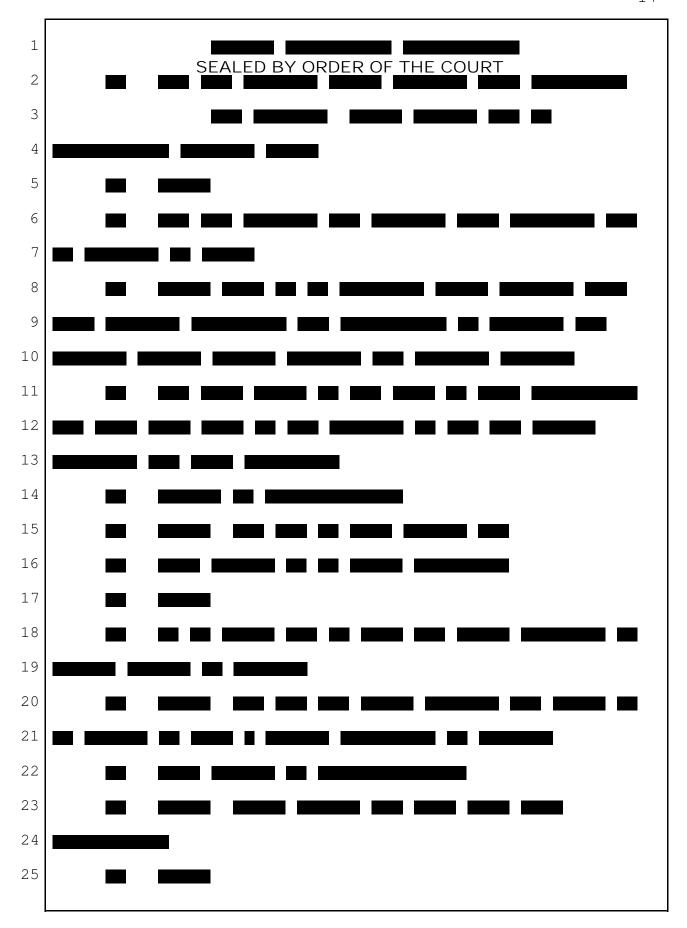


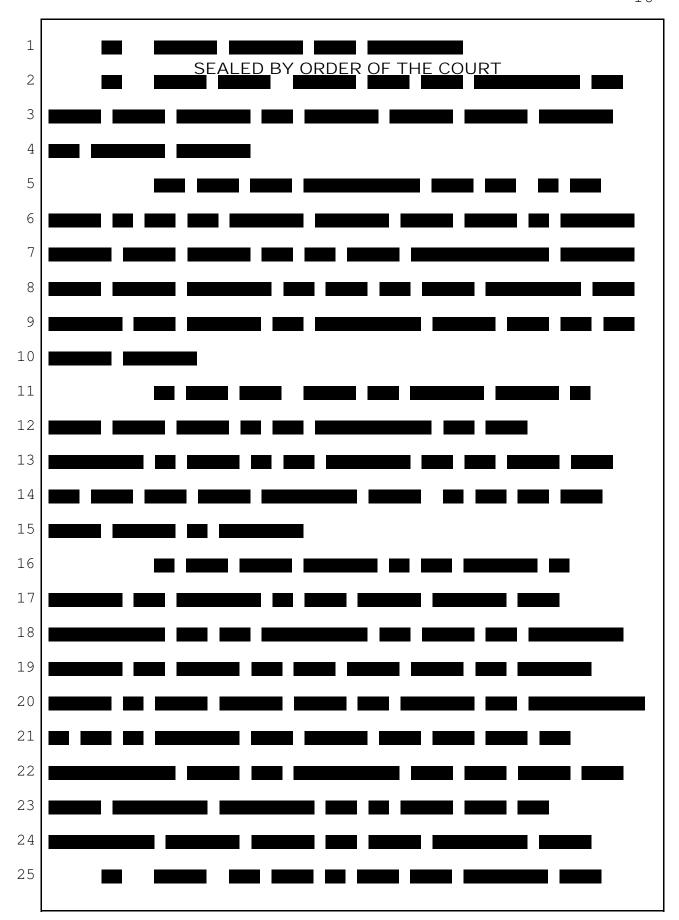


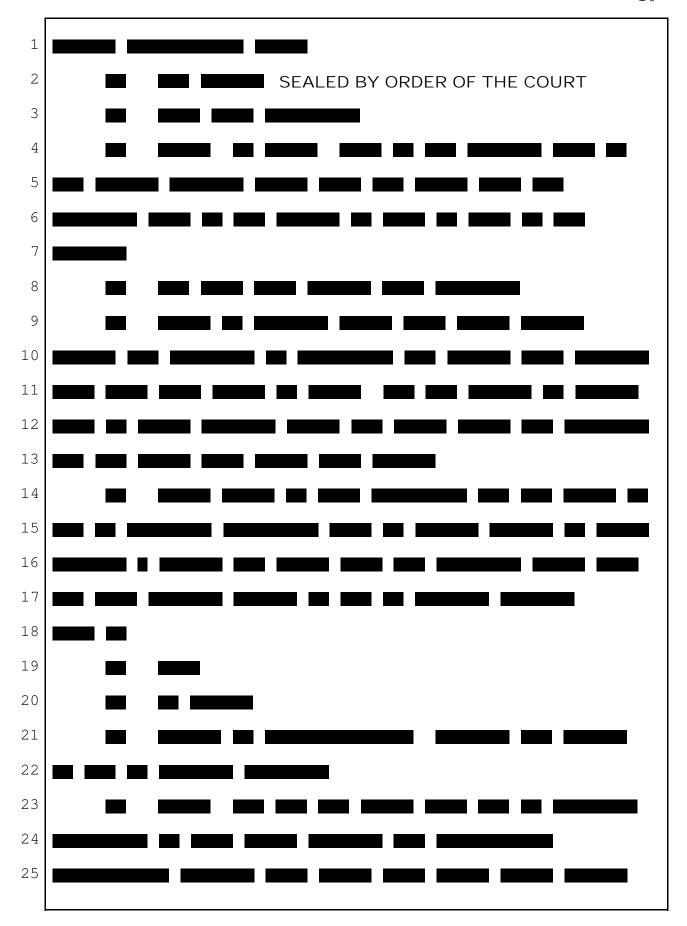


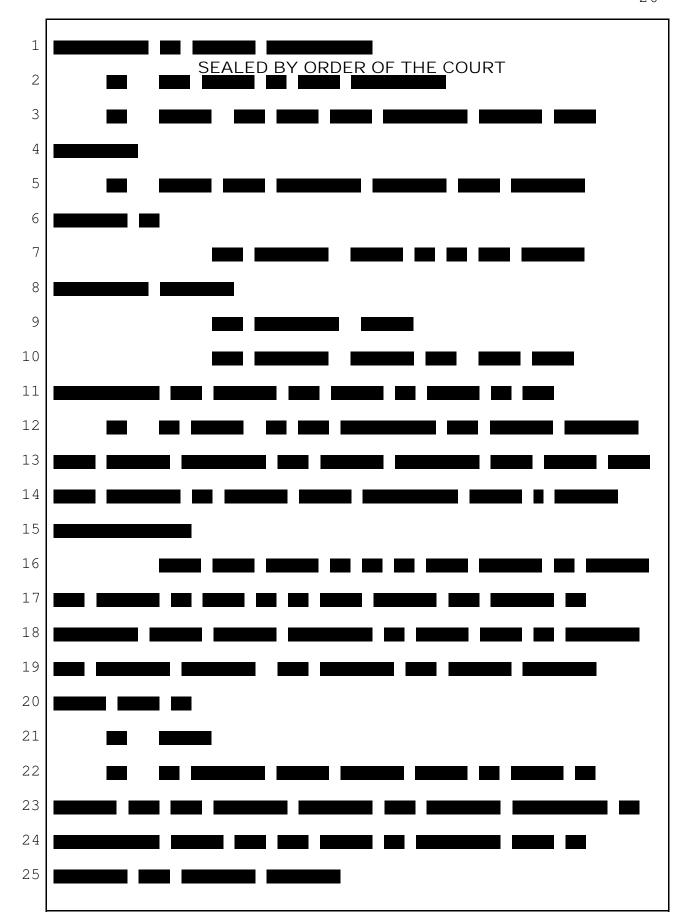


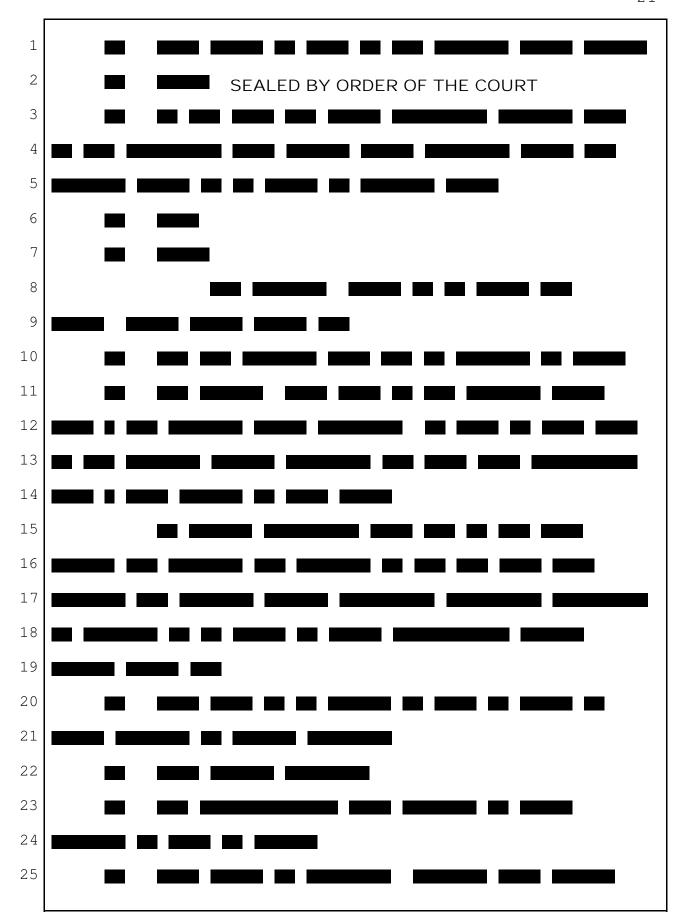


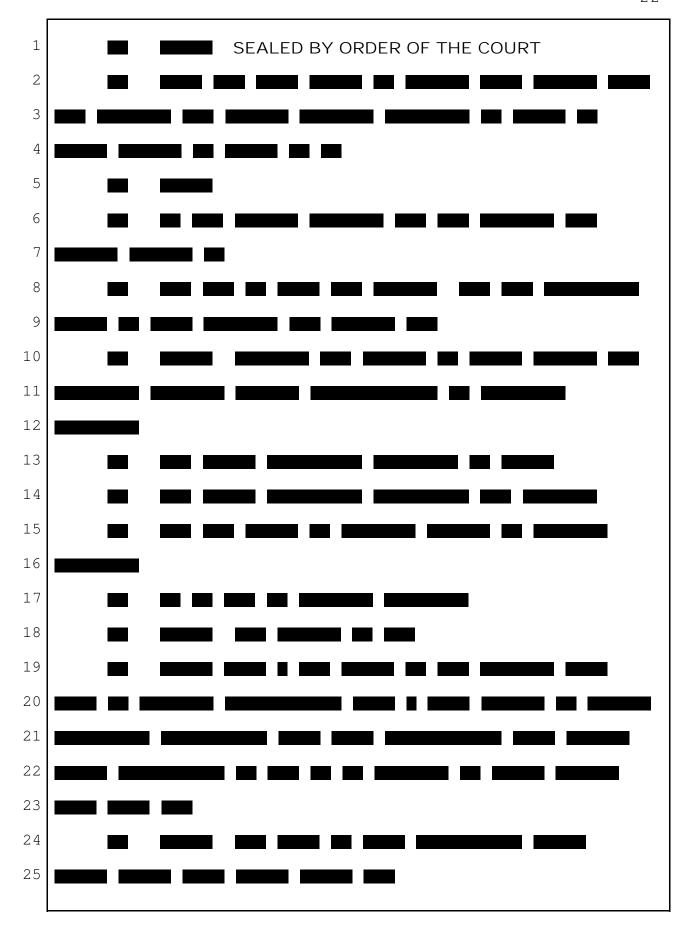


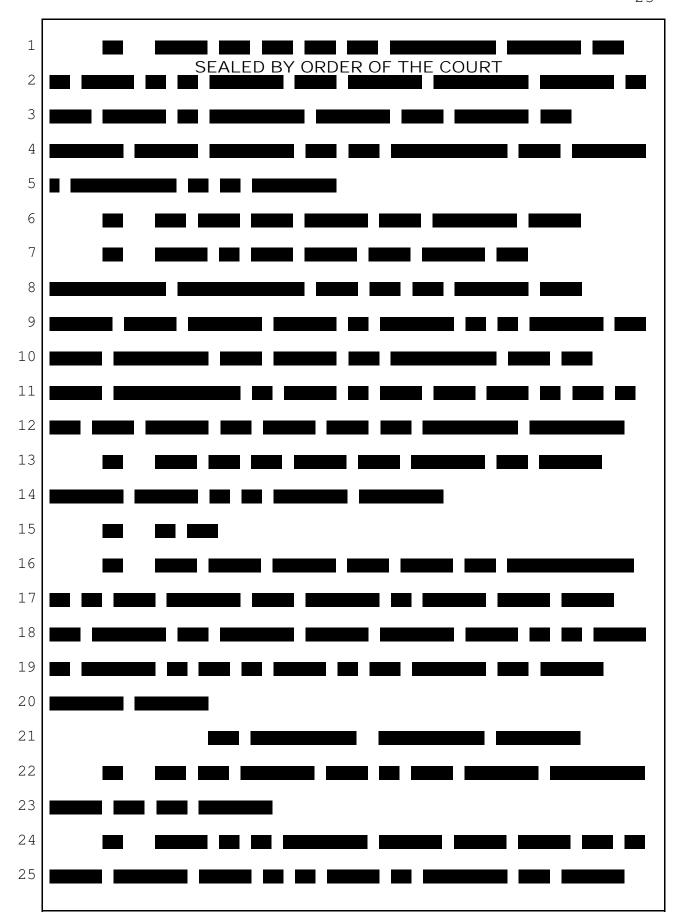


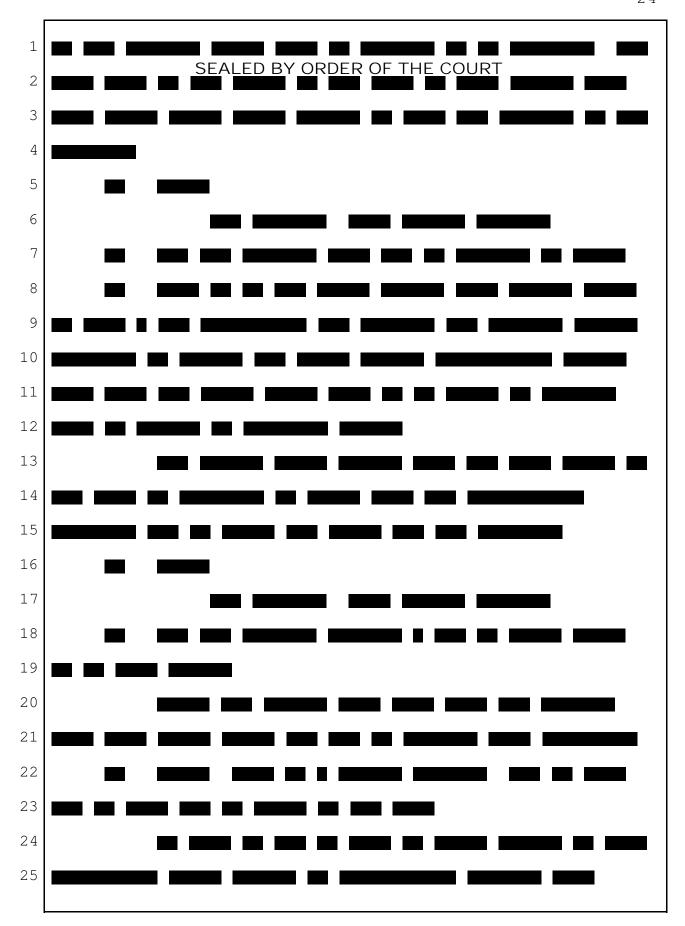


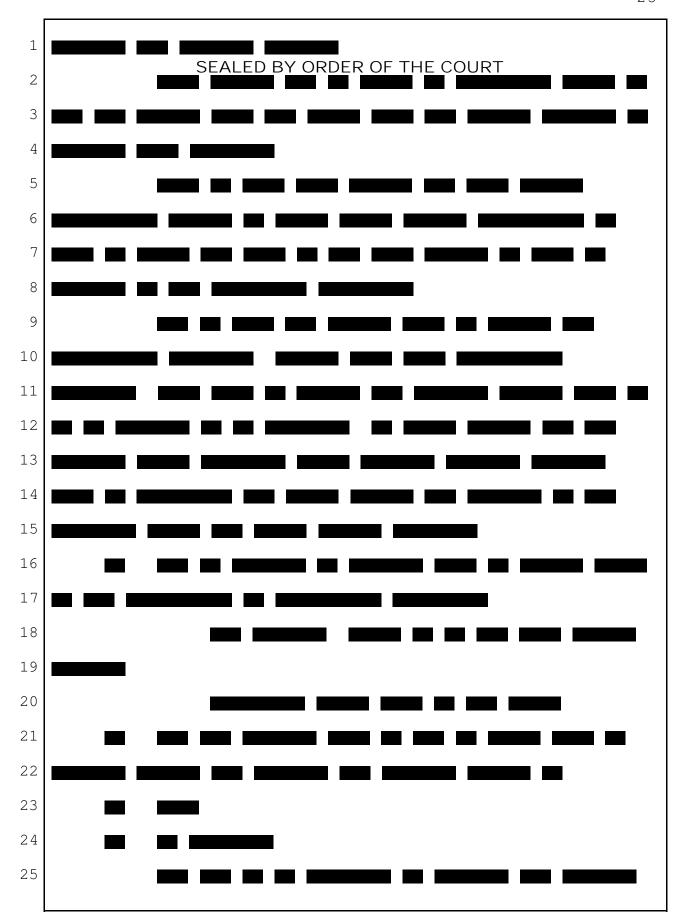


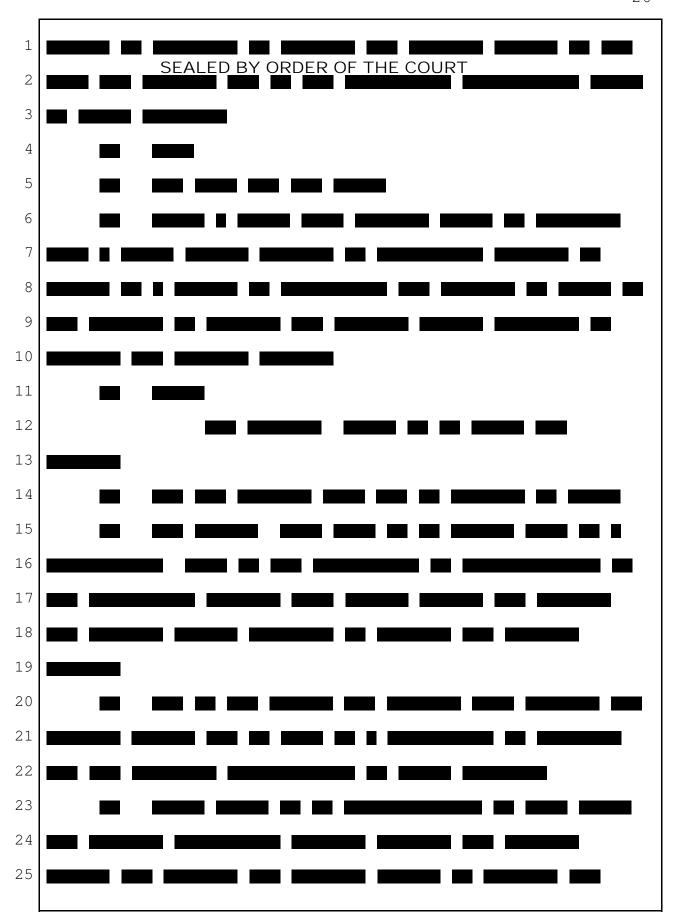


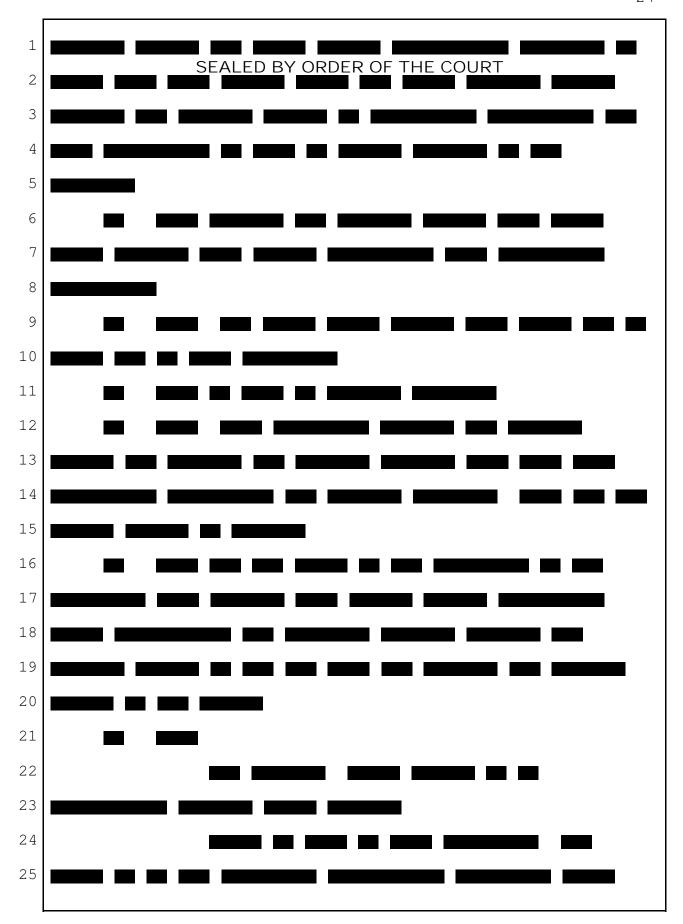


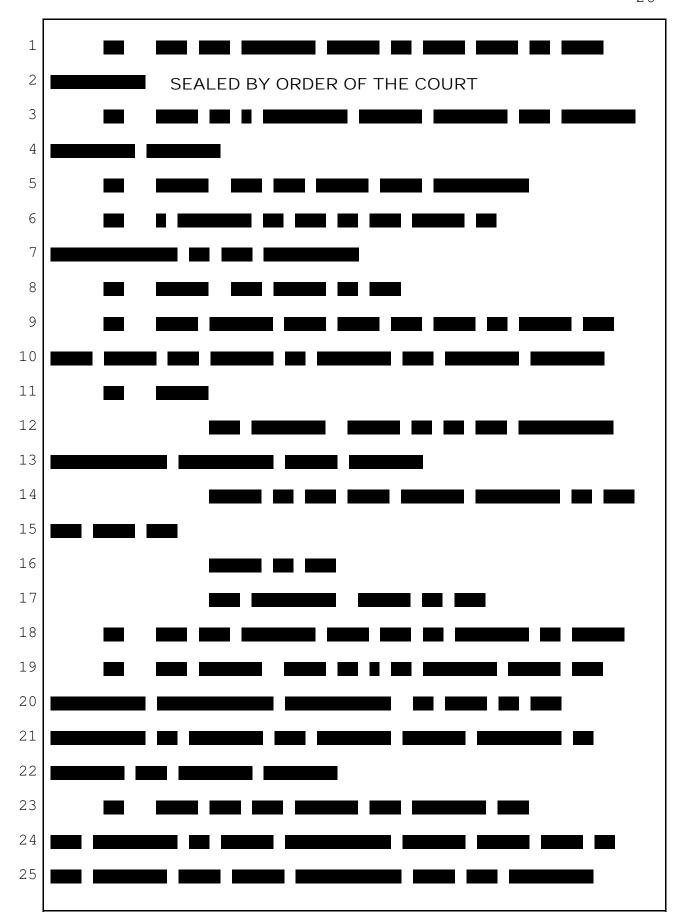


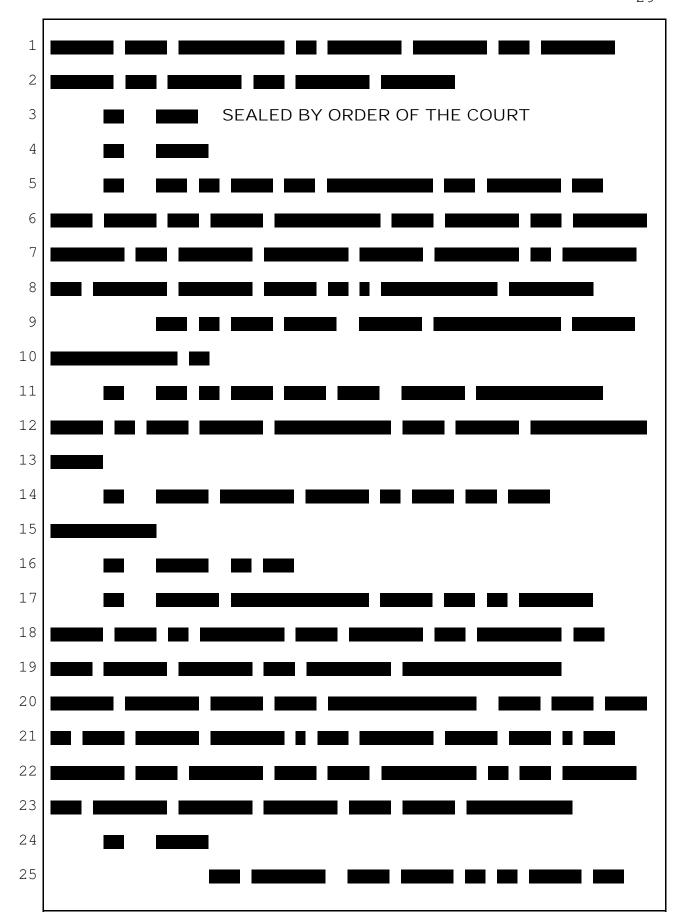


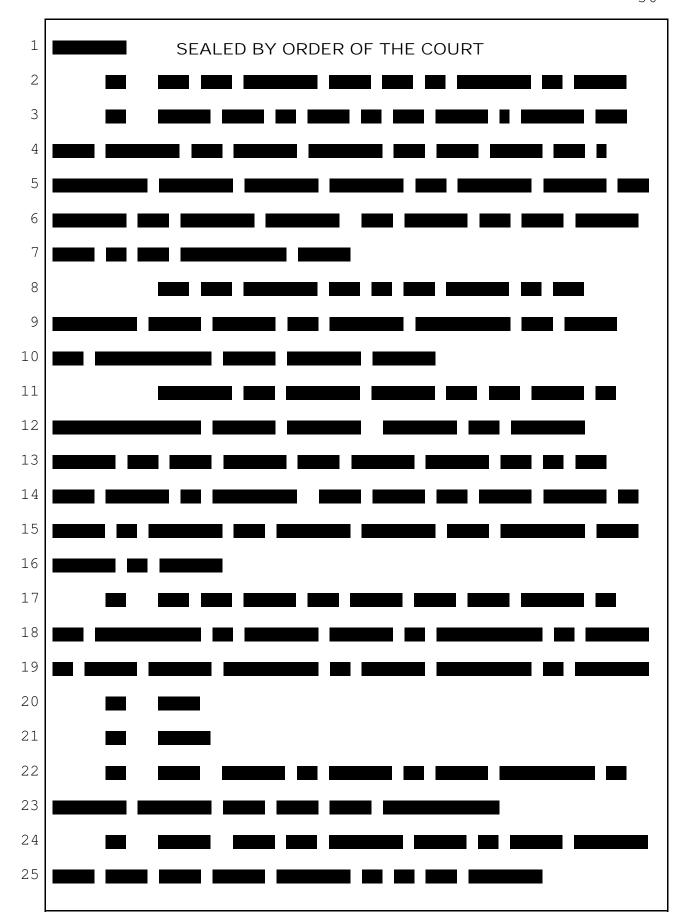


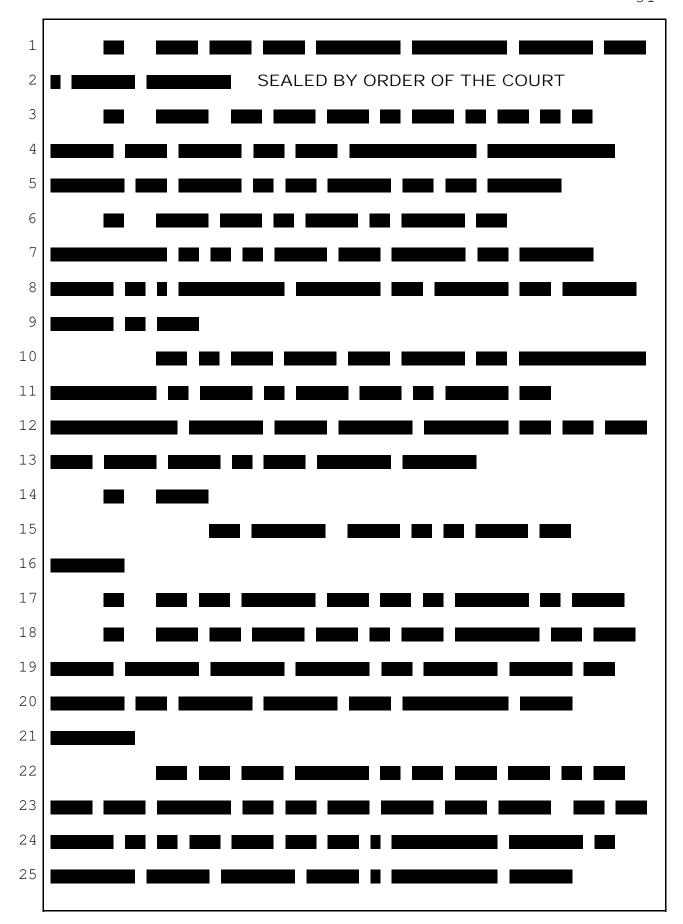


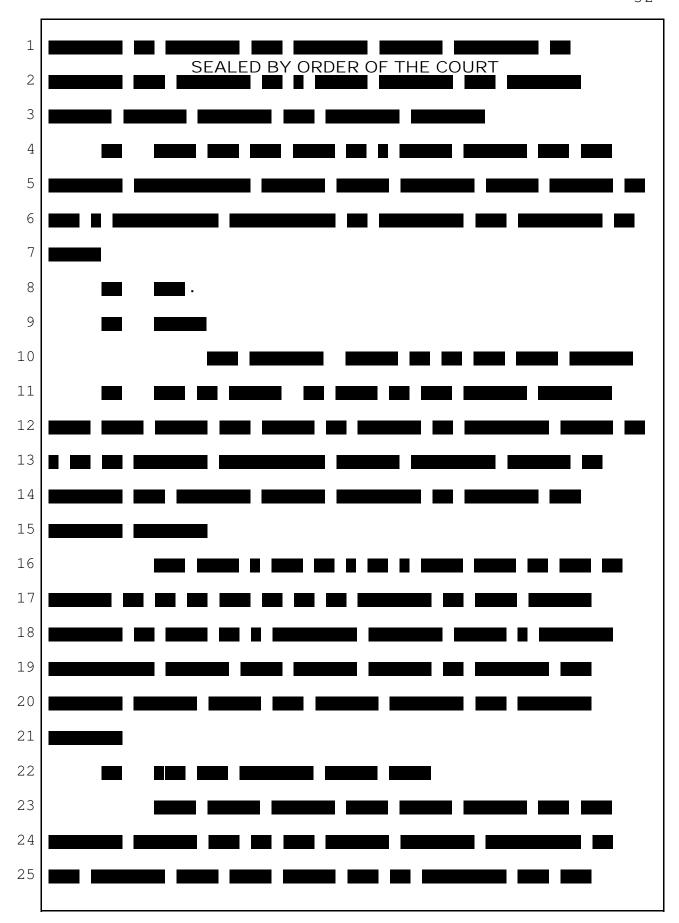


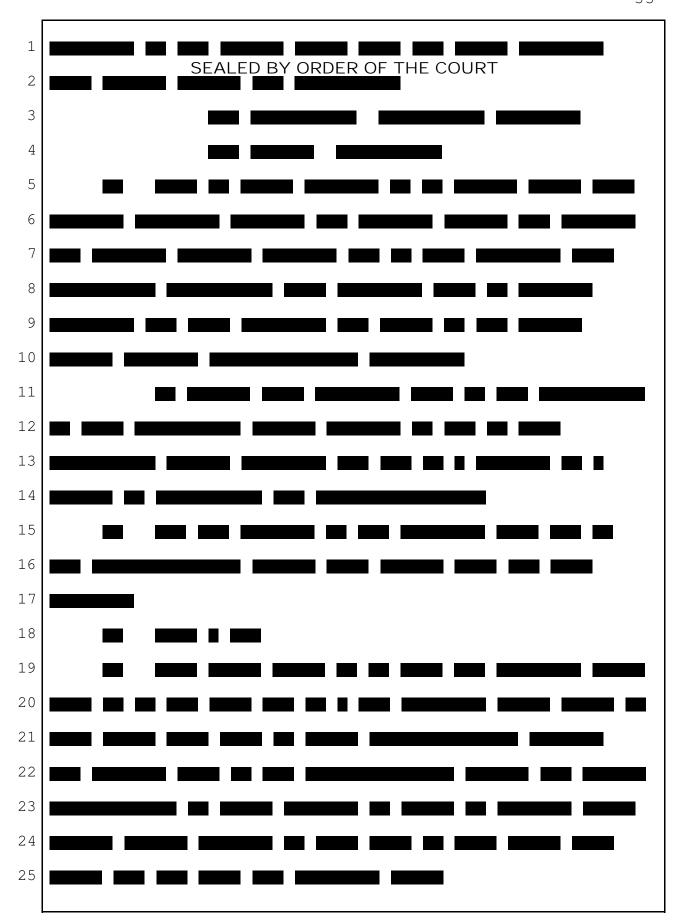


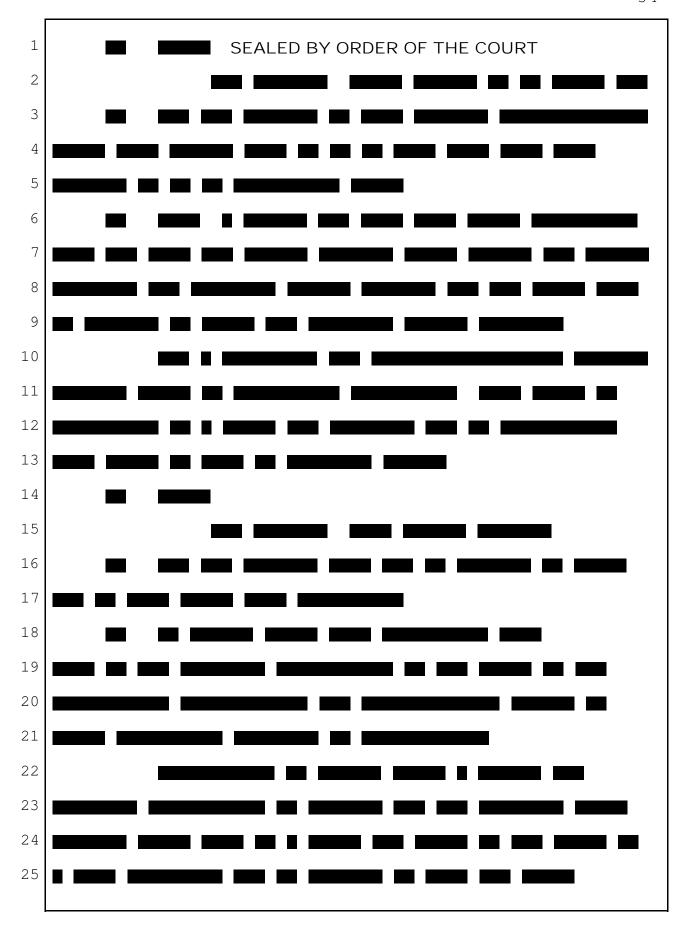












SEALED BY ORDER OF THE COURT
MR. NELSON: Let's please go to
Slide 25.
Q. (By Mr. Nelson) Now, Mr. Bratic, we've gone
through some of the Georgia-Pacific Factors.
Are there some factors that either lower the
rate or might be neutral here?
A. Sure.

Q. Okay. And what are those?

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24

A. Well, I'm looking at the red bar here for license terms, and there's four -- there's four Georgia-Pacific factors here, one of which is the nature and scope of the license.

Now, this license would be -- in the
hypothetical negotiation, would be a bare patent
license. In other words, Google wouldn't get any
technology from Function Media. They'd just get the
right to practice the patent. So that would tend to
favor Google in this case in the hypothetical
negotiation.

- Q. Okay. What about Factor No. 4?
- A. Well, that's the patent owner's willingness to license.

Because Function Media doesn't have products from which it can monetize its patents, then Function Media has to work with companies like Google to generate profits or generate -- excuse me -- a way for Function Media to monetize its patents-in-suit.

So that would tend to benefit Google, because Google is, if you will, the monetization engine in some respect for Function Media's patent.

- Q. Okay. What about No. 5?
- A. Well, here it talks about the competitive

```
nature of the parties, whether they're competitors or
2
  not, and neither Function Media nor Google compete with
3
  each other. So that would tend to favor Google.
             Okay. And what about No. 7?
4
        0.
5
             Finally, the duration and -- of the patent --
        Α.
  well, the duration of the patent, under Georgia-Pacific,
6
   is you go into the hypothetical negotiation and you get
   a license for the life of the patent, for the duration
9
   of the patent. So I really consider this more or less a
10
   neutral factor.
        0.
11
             Okay.
12
                  MR. NELSON: Let's go to Slide 26,
13
   please.
14
             (By Mr. Nelson) What are we looking at here?
        0.
15
             Well, we're now talking about another bucket
16
   of the Georgia-Pacific factors, about the benefits and
   advantages of the invention.
17
18
             Okay. And did you analyze -- as part of your
        Q.
19
   analysis, did you rely on Dr. Rhyne and his opinions
20
   about the importance of these patents here?
21
             Oh, yes, I did.
        Α.
22
        Q.
             Okay.
2.3
                  MR. NELSON: Next slide, please.
24
             (By Mr. Nelson) What are we looking at here?
        0.
```

Well, this is a summary of some of the

```
benefits Google enjoys from -- and benefits that Google
1
2
  enjoys and its publisher partners enjoy from the
3
  patents.
            Now, I know that the jury has seen a lot of
4
5
  documents both from Dr. Rhyne two days ago and yesterday
  and from yourself yesterday.
6
             Are you relying on those documents to talk
8
  about the importance of all of these factors here?
9
             Yes, and other documents I've seen.
10
            Okay. Let's just go through them quickly.
11
  Automated?
12
        A. Yes.
13
            Okay. Scalable, you've seen documents about
        Q.
14
  that?
15
        A. Yes. The scalability, and that means being
  able to draw in, you know, millions of publishers
16
17
   getting a very big system.
18
       Q. Okay. Easy to use. Were you here for
19
  Mr. Dean's testimony?
20
        Α.
            Yes.
21
            Okay. Did you hear him talking about trying
22
   to solve the problem here, to make it easy to use?
2.3
        Α.
            Yes.
24
            Okay. What about this last one?
        Ο.
25
        A. Customization, look and feel. That, as I
```

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understand, is a very important aspect of the
 2
  patents-in-suit, and allows for the customization
 3
  process so you can automatically create these ads that
  have -- are customized to have the look and feel of the
 5
  publisher's website.
             Let me ask you a question specifically to that
 6
   that I don't think has yet come up.
 8
             Have you seen any documents about -- or
9
   evidence about the effect of even a change in font size
   would have on revenue here?
10
            Yes, just changing a font size alone -- I saw
11
   an internal group of memos saying that that would --
12
13
                  THE COURT: Can you slow down a little
14
  bit?
15
                  THE WITNESS: I apologize.
16
                  THE COURT: It's for her benefit as well
17
   as the jurors.
18
                  THE WITNESS: I apologize.
19
             Yes. There was a document I saw that
20
   indicated that Google, if they just changed the font
21
   size in AdSense for Content Online, that could increase
22
   their revenues by a hundred million dollars a year just
23
  for that one change.
24
             (By Mr. Nelson) Okay. And does -- have you
        0.
25
   seen any evidence that Google thinks its important for
```

```
its own site to have these look-and-feel
1
   characteristics?
2
3
        Α.
            Yes.
             Okay. Thank you.
4
5
             Now, we haven't really talked about this My
  Client Center, which is part of the '059 patent.
6
                  MR. NELSON: Actually, Your Honor, let me
8
   approach.
9
                  (Bench conference.)
                  MR. NELSON: I had not thought this is
10
  confidential. I do not think this is confidential. It
11
  is -- what I'm about to ask is -- and they have not
12
  raised it as confidential. It is -- it's 53 percent of
13
14
  AdWords revenue comes through MCC, and I -- I just want
15
  to be really careful here.
                  MS. CANDIDO: I believe that's correct.
16
   That's something I need to ask our client here.
17
18
                  MR. VERHOEVEN: We can check with our
19
  client right now.
2.0
                  MR. NELSON: Is it okay if you can
   explain to the jury why we're -- why I have to go back
21
22
   and forth so much about trying to maintain the
23
  confidentiality here?
24
                  THE COURT: (Nods head.)
25
                  MR. NELSON: Thank you.
```

```
MS. CANDIDO: We can live with that.
 1
 2
                  THE COURT: Okay. All right.
 3
                  MS. CANDIDO: Thank you.
                  THE COURT: I'll do that at a break.
 4
 5
                  MR. NELSON: Thank you.
                  (Bench conference concluded.)
 6
 7
            (By Mr. Nelson) Mr. Bratic, have you seen any
        Q.
   evidence about the percentage of revenue of AdWords that
   comes through My Client Center, which is the accused
10
   product -- part of the accused product in the '059
   patent?
11
12
             Yes. It's over 50 percent. If my
        Α.
   recollection is correct, it's around 53 percent.
13
14
        Ο.
             Thank you.
15
                  MR. NELSON: Let's go to the next slide,
16
  please.
17
        Q. (By Mr. Nelson) What are we looking at here,
18
  Mr. Bratic?
19
            Well, this is based on my discussions, my
20
   interviews of Dr. Rhyne and his testimony here in the
21
   Court, that there's no acceptable non-infringing
   alternatives.
22
2.3
             And what that means is -- from an economic
24
  standpoint is, there's no other way of achieving the
25
  benefits of practicing the patents-in-suit, unless you
```

42 practice the patents. In other words, there's no way to 1 2 get the same benefits in a non-infringing manner. 3 And we talked a little bit about this while the courtroom was sealed. 4 5 Does that evidence support your opinion here, that there is no available alternative non-infringing --6 7 Α. Yes. 8 Q. Thank you. 9 Α. I'm sorry. 10 No, no, that's okay. Q. 11 Α. I didn't mean to speak over you. 12 Q. And are you aware of Google's other arguments 13 about how they can just make changes and -- and what Dr. Rhyne has said about those, about whether they can make 14 15 a change to make it an alternative here? 16 Α. Yes. And what is your opinion about those? 17 18 Well, it's that basically those arguments or

- basically they're actually removing the functionality as
- 20 opposed to doing -- doing the same or similar
- 21 functionality just in a different way.
- That's a very different situation. It's not the same. It doesn't qualify for being an acceptable
- 24 substitute.
- 25 Q. Okay.

1 MR. NELSON: Let's please go to Slide 37. (By Mr. Nelson) What are we looking at here, 2 3 Mr. Bratic? Well, this is the last two Georgia-Pacific 4 5 factors, one of which is relying on the opinion of And I've relied on Dr. Rhyne's expertise in 6 experts. forming part of my opinions. 8 And, finally, all those Georgia-Pacific 9 factors we've talked about, all 14 of them, roll up into 10 that hypothetical negotiation I was talking to you about 11 yesterday. 12 Q. Okay. 13 MR. NELSON: Let's please go to Slide 38. 14 (By Mr. Nelson) What is this? 0. 15 Now, this is just a recap of the 15 factors 16 and kind of how they would be affected in a hypothetical 17 negotiation. 18 Q. Okay. And this has --19 So --20 I don't want you to go through them 21 individually and talk about them all --22 Α. Right. 2.3 -- right now, but is this a fair summary of --24 It is. And you can see the green arrows are 25 pointing up, so most of these factors are pointing up,

and that means they tilt in favor of Function Media in a 1 2 hypothetical negotiation. 3 There's three Georgia-Pacific factors that go down that are in favor of Google. And the big -- the 4 5 yellow lines going across are just that there's two factors that, in my opinion, are neutral. 6 7 Q. Okay. 8 MR. NELSON: Let's go to the next slide. 9 Q. (By Mr. Nelson) What is this? 10 Well, that's just my opinion that a reasonable royalty rate in this case would be 12 percent of the 11 sales of the accused products. 12 13 Q. Okay. 14 MR. NELSON: Next slide, please. 15 Q. (By Mr. Nelson) Okay. We've talked about the rate. 16 17 Α. Yes. 18 Q. Let's talk about the base. 19 Α. Right. 20 How did you determine that the base of the Q. 21 accused products here was \$5.061 billion? 22 Well, Google produced a lot of detailed Α. 23 financial records, and we went through those in great detail and pulled out information regarding AdSense for 24 25 Content Direct sales, AdSense for Content Direct and

AdSense for Content Online. 1 That information was provided through 2 3 September 30th, 2009. So I took that information and I kind of, what's called, analyzed or I kind of just 5 pulled it forward to last -- up to this last Monday right before trial. 6 Q. Did you use conservative projections for the fourth quarter data here? 9 Α. Yes. In my view, I did. 10 Q.. Okay. 11 I could have used higher estimates, but I Α. 12 didn't. Let me ask it differently. 13 0. 14 Were there higher rates that you reasonably 15 could have used? 16 Α. Higher growth rates I could have used, but I 17 didn't. 18 Q. Okay. 19 MR. NELSON: Let's please go to Slide 41. 20 (By Mr. Nelson) What are we looking at here? Q. 21 That's just a breakdown of AdSense for Content Α. Online and AdSense for Content Mobile sales. And you 22 23 can see the vast majority of them have been AdSense for Content Online, but they total a little over \$5 billion 24 25 dollars to date.

1 Q. Okay. MR. NELSON: Let's go to Slide 43. 2 3 (By Mr. Nelson) What is this? Q. Oh, well, this is just the sum -- this is just 4 5 the final result. If you take the 12-percent royalty rate, based on my analysis of the Georgia-Pacific factors, multiplied by a little over \$5 billion in accused sales from July 2007 to now, you'll get a royalty of \$607 million. 10 Now, that's a large number. It is. 11 Α. 12 Have you done any reasonableness checks here Q. to support that number? 13 14 Α. Yes. 15 Okay. There are some we talked about while the courtroom was closed. 16 17 Α. Right. 18 Okay. Were there others that you also Q. 19 discussed? 20 A. I did. 21 Q. Okay. 22 MR. NELSON: Let's go to Slide 49. 2.3 (By Mr. Nelson) What is this that we're Q. 24 looking at? 25 Well, this was -- I mentioned earlier, if you Α.

- had taken Google's stock -- I mean -- excuse me -- the 1 2 stock that was given to Stanford in the Google transaction in 1998, that stock would have been worth at 3 the time of the hypothetical negotiation \$1.4 billion. 5 And I'm showing that in comparison to the royalty to Function Media of about \$600 million. 6 Excuse me. Now, you said this at the Q.. beginning of your testimony yesterday. We've looked at 9 a lot of documents, a lot of evidence. 10 What is -- is this all the evidence you relied on in the formation of your opinion? 11 12 Α. No. I've just given you an overview of the 13 many things I did; you know, the legal pleadings, the 14 detailed financial records. I've looked at the 15 deposition transcripts. I've looked at -- I've only shown you some of the internal e-mails and slide 16 presentations from Google and witness depositions and 17 18 exhibits. 19 And I've relied on all of that information as 20 represented in both of my expert reports. 21 MR. NELSON: Let's go to Slide 17. 22 (By Mr. Nelson) What are we looking at here, Q. Mr. Bratic? 2.3 24 This is just, if you will, a summary of the
- various licensing data points we discussed yesterday.

So you can see, to Function Media, their perspective going into the hypothetical negotiation, was looking for a royalty rate in the range of 8 to 20 percent of sales.

## REDACTED BY ORDER OF THE COURT

We looked at the internet industry royalty rates in the year of the hypothetical negotiation, which was an average of 10 percent; a median of 13-1/2 percent.

So if you average all of these four lines, that gets you to 12 percent.

- Q. Let me ask you a question: Do you think that a reasonable royalty rate of say -- on the lower end of the range of 8 percent would be reasonable here?
- A. Yes, I think it would be reasonable. I think it would be in the lower end of the reasonable royalty range, but it's certainly would still be a reasonable royalty rate.
- Q. Let me ask you a question on the other end of the scale, just to be clear.
- 25 A. All right.

1 2 REDACTED BY ORDER OF THE COURT 3 4 5 6 7 8 9 Q. Okay. 10 MR. NELSON: Let's go to the next slide. Actually, go to Slide 50, please. 11 12 (By Mr. Nelson) What are we looking at here? 13 Well, what we're looking at here is I've just 14 done various calculations to give the jury an example of 15 how the formula works. 16 For example, if you took an 8-percent royalty, 17 which is the low end of Function Media's numbers and the 18 low end of industry royalty rates at the time, and I'm 19 breaking it down for royalties for AdSense for Content 20 Online and AdSense for Mobile Online. But if you take 8 percent of the accused sales 21

of about \$5 million (sic), you end up with royalties of around almost \$405\$ million.

Q. Okay. Let me stop you there.

22

2.3

24

25

MR. NELSON: Can we approach?

(Bench conference.) 1 MR. NELSON: I'd like to move to admit 2 3 this as a summary of Mr. Bratic's opinion, but I didn't want to do it so that they're put in the position of 5 having to object, and so I didn't --MR. VERHOEVEN: These are demonstrative 6 7 exhibits, Your Honor. 8 THE COURT: I'll sustain the objection. 9 It can be used for demonstrative purposes. There's too 10 much of his opinion testimony up in there. It's a demonstrative. 11 12 MR. NELSON: Okay. 13 MR. VERHOEVEN: Your Honor, while we're here so I don't have to call another side-bar, when I'm 14 15 doing my cross, I intend to cover some of the same stuff he's already closed the courtroom for. 16 17 Rather than me come up and do a side-bar, should I just tell you from the lectern that --18 19 MR. NELSON: We have an objection to 20 Mr. Bratic being limited to what he can say in an answer 21 in open court to what Mr. Verhoeven asks. And if he wants -- I would rather that the courtroom be sealed for 22 2.3 the entire cross than have some, you know, back and 24 forth. 25 I don't think that's appropriate, but I

```
want to make sure that my expert can testify truthfully
1
2
   and completely about it.
3
                  MR. VERHOEVEN: Well, I didn't finish
  what I was going to say, Your Honor.
4
5
                  All I was going to say was, I'm going to
  cover some of the same topics that we've already agreed
6
  the courtroom should be cleared on. And I was just
   saying, rather than me coming up every time and
  having -- excuse me -- a side-bar, that I would just
10
   indicate to you -- I mean, if -- I assume Your Honor
11
   wants to keep the courtroom open as much as possible.
12
                  THE COURT: How much cross do you have?
13
                  MR. VERHOEVEN: Maybe an hour and a half.
  Hour, hour and a half.
14
15
                  THE COURT: Okay. Well, just signal to
        I'm going to -- I'm going to announce when you --
16
17
   when you pass the witness, I'm going to let them know
18
   what I'm going to do. But I'm going to go ahead and --
19
   I'll do that at the -- at the time after you pass the
20
   witness, okay?
21
                  MR. VERHOEVEN: I'm sorry. Clear it for
   the whole time?
22
2.3
                  THE COURT: No. I'm going to just -- I'm
2.4
   going to -- you can just signal me from the lectern, but
25
   I'm going to let them know there may be -- because of
```

```
the nature of cross-examination, there may be multiple
 1
   times I have to invite them to leave.
 2
 3
                  They're invited to -- if they want to or
   if they elect to stay outside the entirety of the
 4
 5
   cross-examination anticipated for about an hour and a
 6
   half.
 7
                  MR. VERHOEVEN: Thank you.
 8
                  THE COURT: Okay.
 9
                  (Bench conference concluded.)
10
             (By Mr. Nelson) Mr. Bratic, we were discussing
   this slide.
11
12
        Α.
            Yes.
13
            And you were discussing the rates on the low
14
   end of this scale.
15
             What was your conclusion -- after looking at
16
   all of the evidence and all of the data in this case,
   what do you think the reasonable royalty is that is
17
18
   appropriate in this case?
19
             Well, my opinion is it's what's highlighted on
20
   the very bottom row, that I think an appropriate royalty
21
   rate in this case would be 12 percent of the sales of
22
   over $5 billion, which would give you that royalty
2.3
   amount of $607 million.
24
        Q. Thank you.
25
                  MR. NELSON: I'll pass the witness.
```

THE COURT: Cross-examination. 1 2 MR. VERHOEVEN: Yes, Your Honor. One 3 minute to set up, please. THE COURT: Of course. 4 5 While counsel is setting up, let the jury know that one reason for all of the bench conferences 6 that are being requested by the counsel examining the witness is only counsel who knows what questions he's 9 going to ask, and because of prior orders of the Court, 10 it's the responsibility of the lawyer asking the questions to approach the bench and advise the Court if 11 something is likely to come into evidence that's been 12 13 deemed highly confidential to one or the other of the 14 parties to the case. 15 That's the -- I'm trying to keep the 16 interruptions to a minimum, but that's the nature of the beast in some -- in these types of cases. 17 18 And, likewise, to the folks in the 19 audience, due to the nature of cross-examination, the 20 questions that are propounded to the witness on 21 cross-examination, we may have several occasions that I have to ask you to exit the courtroom during the 22 cross-examination of -- of this witness. 2.3 24 Now, I anticipate the cross-examination 25 is going to take about an hour and a half, so you're

```
invited in for as much of that as you can be here, but I
1
2
   want to let you know, if you want to stay outside for
3
  the entirety of the cross-examination, you can do that,
   or you can come in when I signal the CSO to let you back
5
        It's up to you.
   in.
                  But just -- I just wanted to alert you in
6
   advance that I may have to ask you to leave the
8
   courtroom multiple times.
9
                  Proceed.
10
                  Yes, sir?
11
                  MR. ANDERSON: Permission to approach?
12
                  MR. VERHOEVEN: I have a binder, Your
13
   Honor, to pass out.
14
                       CROSS-EXAMINATION
15
   BY MR. VERHOEVEN:
16
        Q.
            Good morning, Mr. Bratic.
             Good morning.
17
        Α.
18
             Now, the issue here at a really high level is,
        Q.
   what kind of license Google and Function Media would
20
   have come to during a hypothetical negotiation in July
21
   2007, right?
22
        Α.
             At a high level, yes.
             And so -- and we looked at a lot of documents
2.3
24
  that you looked at. I'm going to look at some documents
25
  you haven't looked at.
```

```
1
                  MR. VERHOEVEN: So let's bring up
 2
  Exhibit 710, please.
 3
             I'm sorry. 710?
        Α.
                  MR. VERHOEVEN: And if we could just
 4
 5
  highlight the top third of that page, please, Charles.
             (By Mr. Verhoeven) Now, Defendant's
 6
   Exhibit 710 is a patent purchase and sale agreement,
 8
   correct, sir?
9
        Α.
            Yes, this document is.
10
        Q.
             And this is an actual agreement --
11
             I'm sorry. Excuse me one second.
        Α.
12
             (Witness reviews document.)
13
             Yes. This is just a patent purchase and sale
14
   agreement.
15
             Right. It's not an acquisition of an entire
        Q.
16
   company, is it?
17
        Α.
            No.
18
             It's a patent purchase and sale agreement.
        Q.
19
        Α.
             Correct.
20
            And the analysis that you're supposed to
   engage in is not to analyze what the price would be
21
   or -- or the terms would be for an exact acquisition of
22
23
   an entire company, is it?
24
             I'm sorry. I'm not sure what the question is.
25
             The analysis that you're engaged in is, what
```

```
would be the terms just for a license for the two
 1
   patents at issue in this case, right?
 2
 3
        Α.
             Yes.
             Not for a whole company.
 4
 5
        Α.
             Correct.
             Not for products.
 6
        Q.
 7
        Α.
             Correct.
            Not for software.
 8
        Q.
9
        Α.
             That's correct.
10
             Just bare patents, right?
        Q.
11
        Α.
             Correct.
12
             Okay.
        Q.
13
        Α.
             I agree.
             And this is a patent purchase and sale
14
15
   agreement for bare patents, right?
16
             I believe so.
        Α.
17
             Okay. Well, let's take a look at it.
        Q.
             You see the date on this agreement?
18
19
        Α.
             Yes.
20
             And it's December 18th, 2008?
        Q..
21
             Yes, about a year ago.
        Α.
22
             And you see Google is a signatory to this
        Q.
23
   agreement?
24
        Α.
             Yes.
25
             This is a real-world agreement that Google
```

```
entered into, correct?
 1
 2
        Α.
             Yes, it is.
 3
             And about a little over a year after the date
 4
   of the hypothetical negotiation, correct?
 5
             About a year and a half.
        Α.
 6
            Okay. And you've looked at this agreement as
   part of your analysis, right?
 8
        Α.
             Yes.
9
        Q.
             Okay. Direct your attention to the schedule.
10
             In the bottom right-hand, it says G65173 in
11
  your binder.
12
        Α.
             173? Okay.
13
                  MR. VERHOEVEN: Could we bring that up,
14
  Charles?
15
                  And can we highlight the top all the way
   down to the bottom of the chart -- or bring it out?
16
17
   sorry.
18
            (By Mr. Verhoeven) You see the title here?
        Q. .
19
   Assignment of Patent Rights.
20
        A. Yes.
21
        0.
             Do you see that?
22
             So this is a real-world agreement between
23
   Google and Mr. Meyer, correct?
24
        A. I believe that's correct --
25
        Q.
             Okay.
```

```
1
        Α.
             -- yes.
             And how many patents are subject to this
2
3
   agreement, sir?
             There's three patents.
4
        Α.
5
             Okay. And two applications.
        Q.
             Correct.
6
        Α.
7
             And Google is acquiring an interest in those
        Q.
   patents, right?
9
             Was requiring the entire interest.
10
             Okay. So it's not just a license; they're
11
   getting the entire interest --
12
             They're getting --
        Α.
13
        0.
             -- right?
             -- they're getting all the rights.
14
15
             Right, which is more than what we're supposed
16
   to assume for a hypothetical negotiation, right?
17
        Α.
             That's correct.
18
             Okay. And let's look at what these patents
        Q.
19
   concern.
20
             You see on the right-hand of the column, it
21
   talks about the title of the patent?
             I do.
22
        Α.
2.3
             And the '808 patent at the top, method,
```

algorithm, and computer program for optimizing the

performance of messages, including advertisements.

24

1 Do you see that? I do. 2 Α. 3 So this first one concerns advertising. 0. To -- in some way. 4 5 Yeah. And the second one, the '434 patent --Q. 6 do you see that one? Α. I do. 8 Q. And do you see the title of it? 9 I'll read it for the record. System and 10 method for improving the performance of electronic media advertising campaigns through multi-attribute analysis 11 12 and optimization. 13 Do you see that? 14 I do. Α. 15 And that one also concerns electronic media 16 advertising, doesn't it, sir? 17 Yes, it does. Α. 18 And then the third one, method and Q. 19 algorithm -- excuse me -- method, algorithm, and 20 computer program for optimizing the performance of messages, including advertisements, in an interactive 21 measurable medium. 22 2.3 You see that? I do. 24 Α. 25 This one also concerns advertisements. Q.

- A. Yes, in some way.
- Q. And the two applications, if you take a look, also include electronic media advertising campaigns,
- 4 correct?

1

5

6

- A. Yes. That's what it says.
- Q. So all of these patents, on their face, in the title, concern internet advertising, don't they, sir?
  - A. Yes. They relate to it.
- 9 Q. Okay. And Google -- this is a real-world
  10 agreement where Google purchases these patents, right?
- 11 A. Yes. Google purchased -- well, they purchased 12 the patents and the applications.
- Q. Right. And it's dated about a year and a half after the hypothetical negotiation.
- Okay. Let's see, in the real world, what
  Google paid for that.
- 17 A. Okay.
- Q. Direct your attention back to the first page of this exhibit. For the record, it's G65166, Section 3.1.
- MR. VERHOEVEN: Can we bring that up,
- 22 Charles?
- Q. (By Mr. Verhoeven) And do you see in the middle there, it says, quote, the total purchase price for the assigned rights is -- what is that? What does

```
that say?
 1
             3,550,000.
 2
        Α.
 3
             $3,550,000. Not 600 million, 3 million,
   right?
 4
 5
        Α.
             3-1/2 million.
             3-1/2 million.
 6
        Q.
 7
        Α.
             Correct.
 8
             So in the real world, on this actual patent
        Q.
   purchase agreement that Google actually entered into for
   bare patents, instead of acquisitions, Google paid $3.5
10
  million, right?
11
12
            Well, not quite, because this was an
        Α.
13
   acquisition.
14
             This agreement here is a patent purchase and
15
   sale agreement, sir --
16
        Α.
             Yes.
17
            -- correct?
        Ο.
18
        Α.
                   It's a purchase. It's an acquisition.
             Yes.
19
        Q.
             Okay. It's an acquisition of a company, sir?
20
        Α.
             No. It's an acquisition of assets.
21
             Applied Semantics was an acquisition of a
        Q.
22
   company, right?
2.3
            Correct.
        Α.
             Dclick was an acquisition of a company, right?
24
        Q.
25
        Α.
             Yes.
```

```
D-Link was an acquisition of a company, right?
 1
        Q.
             Yes.
 2
        Α.
 3
            You relied on acquisitions of companies,
   right?
 4
 5
             Not quite -- not -- no. I relied on
 6
  information regarding the acquisition of those
   companies.
 8
             Okay. You didn't rely on this agreement, did
   you, sir?
9
10
        Α.
             No, I did not.
11
        Q.
             Okay.
12
                  MR. VERHOEVEN: Let's go to DX683.
13
        Α.
             I'm sorry. 683?
14
                  MR. NELSON: May we approach, Your Honor?
15
                  THE COURT: Yes.
16
                  (Bench conference.)
17
                  MR. NELSON: The last one was a Meyer
18
   agreement, which is about the terms of the license.
19
                  This is the INVENDA agreement.
20
                  There's also the IBM Agreement in the
21
   book, which this Court has, I think -- I'm not sure of
22
   the exact scope of the ruling. I had the impression
2.3
   that is not reliable because of the --
24
                  THE COURT: I'm sustaining the objection.
25
                  MR. VERHOEVEN: Your Honor, these are
```

```
written documents that exist in the record that he
 1
 2
   reviewed.
 3
                  I'm not asking to have Mr. Wagner testify
   about them, Your Honor. I'm just asking whether he
 4
 5
  looked at these terms and whether he considered them.
  He's free to say on redirect that he didn't consider
   them because the 30(b)(6) didn't have the ability to
   describe them. That's fine.
 9
                  But aren't I allowed to say, these exist;
10
  these are the terms; you reviewed them; but you didn't
   consider them, Your Honor?
11
12
                  THE COURT: Well --
13
                  MR. VERHOEVEN: This is cross-
14
   examination.
15
                  THE COURT: I know it is, Counselor, but
16
   the reason I excluded them was because y'all didn't
   comply with your obligation under 30(b)(6). That's why
17
18
   I prevented you from using them in your case-in-chief,
   and now you're trying to get it in indirectly what I
20
   told you you couldn't do directly.
21
                  So I'm sustaining the objection.
                  (Bench conference concluded.)
22
2.3
                  MR. VERHOEVEN: One minute, Your Honor,
   please.
24
25
                  THE COURT: Yes, sir.
```

(Pause in proceedings.) 1 MR. VERHOEVEN: All right. Charles, if 2 3 we could bring up the exhibit -- it's Defendant's Exhibit 710. I have a couple more questions on that 5 one. And if we could bring up Article 3, 6 7 Section 3.1, on the front page, and highlight that 8 sentence, Charles, that we did on the purchase price. 9 0. (By Mr. Verhoeven) Now, your opinion is that 10 in the hypothetical negotiation between Google and Function Media in 2007, which concerned a nonexclusive 11 license for two patents, that Google would have agreed 12 13 to pay \$607 million, correct? 14 Well, that's what the math results in. 15 would have agreed to pay a royalty of 12 percent. 16 Is it your testimony that Google would have Q. agreed to pay \$607 million as part of the hypothetical 17 18 negotiation, sir? 19 Yes. In the end, my total calculation is \$607 million. 2.0 21 Now, isn't it true that's over 173 times 0. 22 larger than what Google agreed to pay in this real-world 23 patent purchase agreement? 24 A. I haven't done the math, but it's many times 25 higher.

Q. 173. 1 2 Well, divide 6 by 3 is 180, so, yeah, that's 3 probably close. Ο. 4 Okay. 5 MR. VERHOEVEN: Let's go to Defendant's Exhibit 703. 6 A. 703. Okay. MR. VERHOEVEN: And, Charles, if you 8 9 could just highlight the -- bring up what the text is. 10 Thank you. 11 (By Mr. Verhoeven) You see what this is, sir? This is a patent license agreement. 12 13 Do you see that? 14 I do. Α. 15 And Google -- this is a real-world agreement 16 that Google entered into, correct? 17 Α. Correct. 18 This is one of the agreements you reviewed Q. 19 when went through the documents, right? 20 Yes, I did. Α. 21 And who did -- and you see that the other 22 parties to the agreement are Nokia Corporation? 2.3 Α. Yes. 24 Did you know that Nokia Corporation is the Ο. 25 largest telephone wireless handset manufacturer in the

```
world, sir?
1
            Well, at one time, they were. I'm not sure
2
3
   that that's the case today.
             Do you see the second -- or the third entity
4
5
   down? It's got a foreign word, and then it says
6
   Ericcson?
        Α.
             Yes.
             You've heard of Ericcson before, right?
8
        Q.
9
        Α.
             Oh, yes.
             Big company, right?
10
        Q.
             Big Swedish telecommunications company.
11
        Α.
12
             One of the biggest companies in the
        Q.
13
   telecommunications industry in the world, right?
14
             Yes, I would say so.
15
             Okay. And then there's yet another company,
16
   VoiceAge Corporation, right?
17
        Α.
            Yes.
18
             And what's VoiceAge Corporation?
        Q.
19
             Well, I don't know the details of it, but I'm
20
   assuming -- my understanding and my recollection is that
21
   VoiceAge was a company that was somehow owned by these
   two or related to these two companies.
22
2.3
             Direct your attention to Page 5. If you look
  at the bottom -- not the control numbers, but to the
25
  footer, you see there's Page 5 of 39. The control
```

```
number is 31975.
 1
        A. Okay. Yes. Okay.
 2
 3
                  MR. VERHOEVEN: And, Charles, could you
  bring out Section 1.15?
 4
 5
        Q. (By Mr. Verhoeven) This is the license
  provision in the agreement, isn't it, sir?
 6
        Α.
            Well, it's one of them.
 8
        Q.
            And you see about halfway down, it says: For
   convenience, the most recently updated list of such
10
  licensed patents is attached to this agreement in
11
  Appendix A.
12
        Α.
            Yes.
13
        0.
            Do you see that?
14
             I'm sorry. Yes.
        Α.
15
             So let's go to Appendix A.
        Q.
16
        Α.
             Okay.
                  MR. VERHOEVEN: And could we make that a
17
   little easier to read, Charles? Maybe put a box around
19
   it and bring it out?
20
        Q. (By Mr. Verhoeven) This is -- this is the
21
   licensors' list of licensed patents, right?
        A. Yes.
22
2.3
            Okay. And the first list here is from
        Q.
24
   Ericcson, right?
25
        A. Yes.
```

- And, gosh, how many patents are there on this 1 Q. page? Let's see, there's 14 on the first section --2 3 I don't know. I haven't added it up. -- 1, then 10, then 4 -- 29 patents on that 4 5 page, the way I count them. Α. 6 Okay. 7 Does it look like that to you? Ο. 8 I haven't added them up, but I'll agree 9 there's several, probably 20 something. 10 Q.. Okay. 11 MR. VERHOEVEN: And go to the next page, and bring that out. 12 (By Mr. Verhoeven) And it looks like there's 13 Ο. 14 five more patents listed on this page, right? 15 Α. Yes. 16 MR. VERHOEVEN: And then the next page, 17 please. 18 (By Mr. Verhoeven) Now, these are patents that Q. 19 are owned by Nokia, right? 20 Α. That appears to be what to be -- what it is.
- 21 O. Right. And in the right-hand column, it lis
- Q. Right. And in the right-hand column, it lists
  the patents, and it looks like, by my count, there's 19
  more patents on this page.
- Do you agree?
- A. You want me to add them up? I agree

```
1
   there's --
 2
            Well, take a look at it and tell me if you
 3
   agree.
 4
        Α.
             Okay. (Witness reviews document.)
 5
             I counted 21.
             21. Okay. I was off.
 6
        Q..
 7
                  MR. VERHOEVEN: Let's go to the next
 8
   page.
9
        Q.
            (By Mr. Verhoeven) Now, these are patents --
10
                  MR. VERHOEVEN: If we could highlight
11
  that as well and bring it up.
12
             (By Mr. Verhoeven) These are patents that are
        Q.
   listed under VoiceAge Corporation.
13
14
             Do you see that?
15
             I do.
        Α.
16
            And on the right-hand column is a list of
        Q.
17
   patents, right?
18
        Α.
            Yes.
19
             That are being licensed by VoiceAge
20
   Corporation, right?
21
        Α.
            Yes.
22
             Okay. How many patents do you count there?
2.3
             Well, it's 20 something, but do you want me to
  count them specifically?
24
25
        Q. By my count, I have 16, plus 3, plus 17 -- 36
```

```
patents on this page by my count; is that right?
1
2
            I'd have to add it up.
3
        Q. It's a lot.
            I'll agree it's probably somewhere near your
4
5
  number, if not your number.
        Q. And then the next page, it continues.
6
  VoiceAge Corporation, and we've got another -- by my
  count, 27 more patents on this page.
9
            Take a look at it and tell me if you disagree.
10
        Α.
            I agree. Just eyeballing it, it looks like
  it's over 20.
11
12
       Q. Okay. So fair to say, this is a license for
   over a hundred patents?
13
14
            I haven't added it up, but it's probably in
       Α.
15
  that range.
16
        Q. Do you agree with that?
17
       A. Yes.
18
            Okay. And these companies that are licensing
        Q.
19
  these patents, these are big companies, aren't they,
2.0
  sir?
21
       A. Well, I don't know about VoiceAge, but the
  other two are.
22
2.3
      Q. All right.
24
                 MR. VERHOEVEN: Let's look at Appendix C,
25
  the next page. And let's -- if we can highlight from
```

```
the title down to the end of the box, Charles.
 1
 2
       Q. (By Mr. Verhoeven) Now, you see the title?
                                                         Ιt
 3
   says: License fees.
 4
             Do you see that?
 5
        Α.
            Yes.
 6
            And then under C, it says: Maximum annual
 7
   royalty?
 8
        A. I do.
 9
        Q.
            And then at the very bottom --
                  MR. VERHOEVEN: If we could highlight
10
11
  that row in the box.
12
        Q. (By Mr. Verhoeven) -- it says: The maximum
   annual royalty is $2 million; is that right?
13
14
        Α.
             Yes.
15
        Q. So under this agreement with these giant
16
  corporations with over a hundred patents, in the real
   world, Google got a license to all of those patents for
17
  how much?
18
19
            Well, they paid running royalties, but they
20
   couldn't exceed $2 million a year.
21
        Q. Maximum $2 million a year.
        A. Correct.
22
2.3
        Q. Real-world license.
24
        A. Yes.
25
        Q. Google entered into it.
```

A. Yes.

1

2

3

6

7

10

- Q. You didn't consider this as part of your opinion, did you, sir?
- A. I considered it in my analysis, I certainly 5 did.
  - Q. Okay. And what did you consider, sir?
  - A. Well, I considered the fact that -- as I showed the jury yesterday, that Google told VoiceAge that they had a design-around and that that's why they agreed to the cap, because there was a design-around that Google could go to to avoid using VoiceAge's codec.
- MR. VERHOEVEN: Let's go to Plaintiff's
- 13 Exhibit 313.
- Q. (By Mr. Verhoeven) Remember this? You looked at this yesterday, sir.
- 16 A. You have to blow it up for me.
- MR. VERHOEVEN: Okay. Let's blow it up
- 18 for him.
- 19 Q. (By Mr. Verhoeven) Remember this document?
- 20 A. Yes.
- 21 Q. Okay.
- MR. VERHOEVEN: Let's go down to about a
- 23 third of the way down where it says: Take it or leave
- 24 it.
- Q. (By Mr. Verhoeven) It says, regarding the cap,

```
take it or leave it?
 1
 2
        Α.
           Yes.
 3
                  MR. VERHOEVEN: Can you bring that up,
   Charles, and highlight take it or leave it?
 4
 5
        Α.
            Yes.
 6
                  MR. VERHOEVEN: Just take it or leave it,
 7
   Charles.
 8
             (By Mr. Verhoeven) And you remember yesterday,
        Q.
   you said this -- this is a situation sometimes you have;
10
  somebody says: Take it or leave it, right?
11
        A. Correct.
        Q. And that may make the royalty rate a little
12
13
   bit higher if someone has got that position and that
14
   control and that power, right?
15
        Α.
            Correct.
16
             Okay. This license we're looking at, that's a
        Q.
   take-it-or-leave-it license, isn't it?
17
18
        Α.
            From VoiceAge, yes.
19
        0.
            Yeah.
20
        Α.
            Right.
21
        Q.
            Right?
22
        Α.
            Correct.
2.3
            Google has no power. They either have to take
        Q..
24
   it or leave it, right?
25
        A. Well, they either take the license, or they
```

```
don't practice the technology.
 1
 2
             They either take the license, or they leave
   the license, right?
 3
             Okav. Correct.
 4
        Α.
 5
             And they -- they can't up that license; they
  can't negotiate it. It's just take it or leave it from
 6
   these massive corporations, right?
 8
        Α.
             Well, I don't know if it's take or leave from
9
   these massive corporations, but because of the codec
10
   technology, it was their choice to either take the
   license or not practice the license, because they had
11
   another way of getting there.
12
             It was nonnegotiable.
13
        0.
14
             From the VoiceAge standpoint, that's right.
15
             Right. Google couldn't negotiate it. Either
16
   take the deal or you leave the deal, right?
17
             Well, not quite.
        Α.
18
             Google could not negotiate those rates down.
        Q..
19
   You dispute that, sir?
20
        Α.
            Look at the -- yes. Look at the next line.
21
   It says:
            The only leverage we have is --
22
                  THE COURT: Well --
2.3
                  THE WITNESS: I'm sorry.
24
                  THE COURT: The question is, do you
25
   dispute it?
```

1 THE WITNESS: Yes, I do, Your Honor. THE COURT: Okay. 2 3 (By Mr. Verhoeven) Well, yesterday you were --0. you pointed to this --4 5 Α. Yes. -- as saying, basically, support that, well, 6 7 Google would have to take or leave the Function Media 8 patents, too. 9 And what this document is talking about is the 10 VoiceAge agreement, correct? 11 Α. Yes. 12 Okay. And the VoiceAge agreement, the amount Q. that Google had to take or leave for over a hundred 13 14 patents was maximum \$2 million a year. 15 Yes. The maximum was \$2 million a year. 16 That's a real-world agreement between (sic) Q. Google for a license of over hundred patents, right? 17 18 Well, I didn't add up the total patents, but I 19 agree, it's a real-world license. 2.0 And isn't it true that that's over \$240 Q. 21 million -- let me -- let me take that back. 22 Now, let's circle back to your opinion. Your 23 opinion is that Google, in a hypothetical negotiation with Function Media, that has no facilities, has no 24 25 employees, has no operations, has no working software,

```
has no customers, has no impressions, that,
2
  nevertheless, Google would pay them over $600 million
3
   for a license for only two and a half years.
             That's your opinion, right, sir?
4
5
             Correct. Two and a half years to date.
        Α.
             Okay. Now, isn't it true that that is over
6
   $240 million per year more than what Google paid in this
   real-world VoiceAge license agreement?
9
             I don't want to quibble with you, but I don't
10
   know exactly what all Google ended up ultimately paying
   VoiceAge. We just know what the maximum was every year.
11
12
             Isn't it true that that is over $240 million a
        Q.
13
   year more -- your opinion of what would have happened in
   the hypothetical negotiation, $240 million more than the
14
15
   maximum Google would ever have to pay under this
16
   real-world license agreement of over a hundred patents
   with these massive corporations?
17
18
             Isn't that true, sir?
19
        Α.
             Yes, I would agree with that.
20
                  MR. VERHOEVEN: Let's go to DX707.
21
        Α.
             Okay.
22
                  MR. VERHOEVEN: And in particular,
23
   Charles, if we could go to G64344.
24
                  And could we highlight the title in the
25
   top paragraph, please.
```

```
1
                  MR. NELSON: May we approach, Your Honor?
                  THE COURT: Yes.
2
3
                  (Bench conference.)
                  MR. NELSON: There were numerous -- there
4
5
   were numerous agreements that were in -- Mr. Chen
  testified that he said, I don't know about, including
6
   this one. This was not specifically called out in the
  motion.
9
                  THE COURT: Okay. Overrule the
10
   objection.
11
                  MR. NELSON: Okay.
12
                  (Bench conference concluded.)
13
             (By Mr. Verhoeven) Now, this is an
        Ο.
14
   agreement -- I think the date is October 7th, 2004.
15
             Do you see that?
16
             Yes.
        Α.
17
                  MR. VERHOEVEN: Could we highlight that,
18
   please, Charles?
19
                  No, no. Please bring the title and that
20
   first paragraph up again and just highlight the date, so
21
   the jurors can see it. It's right up here (indicating).
22
                  Thank you.
2.3
             (By Mr. Verhoeven) And the agreement is
   between Hewlett-Packard and Google. Do you agree with
25
  that?
```

```
A. Hewlett-Packard Development Company and
 1
  Google, yes.
 2
 3
       Q. Okay. So this is another real-world agreement
  that concerns intellectual property that Google entered
 5
  into, right?
 6
       A. Yes.
       Q. And Hewlett-Packard, you've heard of them
  before, haven't you?
9
       A. Yes.
       Q. They're a massive corporation, aren't they?
10
11
            They're a big company.
       Α.
12
       Q. Yeah. And this agreement was entered into in
  around 2004, right?
13
14
       Α.
            Yes.
15
       Q. All right. I direct your attention to Page 6
16
  of this agreement. Control number is G64349.
17
       A. 49?
18
       Q.
           64349.
19
       A. Okay. Oh, I see. Page 6. Okay.
20
                MR. VERHOEVEN: And could we bring up
  Section 2.1?
21
22
       Q. (By Mr. Verhoeven) And it says: Patent
2.3
  Licenses.
24
            Do you see that?
25
       A. Yes.
```

- 79 This is a real-world patent license agreement 1 Q. 2 that Google and HP entered into, correct? 3 Well, it was more than just a patent license. Does this say: Patent Licenses? 4 5 That part of it says: Patent Licenses. Α. And it says: Patent license grant to Google 6 under licensed e-mail and video patents. 8 Do you see that? 9 Α. I do. 10 And do you see that that paragraph refers to a Schedule 1? 11
- 12 Α. Schedule 1.
- I apologize. It doesn't refer to it. It says 13 that effective as of the effective date and subject to 14 the terms and conditions here of HPDC -- and that's a 15 reference to Hewlett-Packard, right? 16
- 17 A. Yes.
- 18 Q. Hewlett-Packard Development Corporation?
- 19 Α. Yes.
- 20 Q. -- hereby grants Google and its affiliates a personal, nontransferable, nonexclusive, 21
- nonsublicensable license under the license e-mail and 22 23 video patents.
- Do you see that? 24
- 25 I do. Α.

```
1
        Q. I direct your attention to Page 19,
2
   Schedule 1.
3
        Α.
             I'm sorry. Page --
            19.
4
        0.
5
            Number Page 19.
        Α.
            And this is G64363.
6
        Q.
7
        Α.
            Okay. Let me -- okay.
8
                  MR. VERHOEVEN: And if we could bring
  that a little bit larger, Charles.
             (By Mr. Verhoeven) Now, this is a list of the
10
  patents that are being licensed by HP, correct?
11
12
             Excuse me. This is a list of the patents that
13
   Google is licensing from HP, correct?
            Let me look.
14
        Α.
15
             (Witness reviews document.)
16
             Yes. This -- this -- well, they don't
  make a reference back in 2 -- Section 2.1.
17
18
             (Witness reviews document.)
19
             I can't say for certain only because there's
  no reference back in the Section 2.1 to Schedule 1
2.0
  and --
21
        Q. You can't tell?
22
2.3
            Well, I don't have a patent number -- it just
  says patent numbers; it doesn't say whose the owner of
25
  the patents.
```

```
1
        Q.
             You see the title? It says: Licensed e-mail
 2
   and video patents.
 3
             Do you see that?
            Yes.
 4
        Α.
 5
            Okay. And you see there's 14 patents listed
   there?
 6
        Α.
             Yes.
 8
        Q. You saw Section 2.1. Did you forget what that
9
   said, or do you remember?
10
             No. I have -- actually have the page open.
11
                      License under the licensed e-mail
        Q.
             It says:
   and video patents.
12
13
             Do you see that?
14
             Yes.
        Α.
15
            These are the licensed e-mail and video
16
   patents, aren't they, sir?
17
        Α.
             I agree.
18
             Okay. So Google takes a license in the real
        Q..
   world from a massive corporation, Hewlett-Packard, one
20
   of the biggest computer corporations in the world, for
21
   14 patents, right?
22
        A. Yes.
23
        Q. Okay.
24
                  MR. VERHOEVEN: Now let's look at Page
25
   11, G64454.
```

1 Q. (By Mr. Verhoeven) Are you there? I am. 2 Α. 3 MR. VERHOEVEN: Charles? (By Mr. Verhoeven) And this section is talking 4 0. 5 about what Google has to pay for those patents, right? That's the consideration, yes. 6 Α. 7 Ο. Yes. 8 MR. VERHOEVEN: Let's go to the next 9 page, please. 10 And then if we can bring up the first full paragraph, please. 11 12 Α. I'm sorry. 13 (By Mr. Verhoeven) In the second sentence --0. 14 I'm sorry. Excuse me. What page are you on? Α. 15 Page 12, Control No. G64355. Q. 16 Oh, okay. The top of Page 12. Thank you. Α. 17 The second sentence says, quote, no additional Q. 18 payments will be required at such time when aggregate 19 amounts paid under the earlier clauses exceed \$20 2.0 million. 21 Do you see that? I do. 22 Α. 2.3 So under this agreement with HP, Google --Google's maximum payment is \$20 million, agreed? 24 25 Correct. Α.

- 1 Q. Okay. Now, you testified that Google would
- 2 have agreed in the hypothetical negotiation with
- 3 Mr. Stone and -- or excuse me -- with Mr. Dean and
- 4 Ms. Stone in 2007, that Google would have agreed to
- 5 \$607.3 million, right?
- A. Yes.
- 7 Q. Okay. But this real-world agreement with
- 8 Hewlett-Packard, a massive company with major worldwide
- 9 facilities, Google agreed to -- the maximum Google paid
- 10 for 14 patents is \$20 million, right?
- 11 A. The maximum they agreed to pay, yes.
- 12 Q. That's over \$587 million more that you say
- 13 Google would pay to two individuals, Mr. Dean and
- 14 Ms. Stone, than it would pay for 14 patents, instead of
- 15 two patents, to a massive corporation.
- Is that your testimony, sir?
- 17 A. To the two individuals and their company, yes.
- 18 Q. That company is Function Media, right?
- 19 A. Correct.
- 20 Q. Function Media was formed for the sole purpose
- 21 of enforcing the patents, wasn't it, sir?
- 22 A. Well, I don't know if it was for enforcing the
- 23 patent. It was an assignment to that company.
- Q. It's a holding company, right?
- A. It is a holding company.

- Q. It has no operations, does it?
- 2 A. Other than its licensing program, no.
- Q. Doesn't have any facilities?
  - A. Well, I don't know what facilities --
- 5 Q. You don't know?
- 6 A. My understanding is that they have
- 7 operations -- they're based out of Tyler, Texas.
- 8 Q. Well, do they have offices?
- 9 A. I assume they have some kind of office.
- 10 Q. You don't know?
- 11 A. Well, I haven't been to their office.
- 12 Q. Did you look into it?
- 13 A. Not in any detail, no.
- 14 Q. Did you look into whether they had any
- 15 employees?

- 16 A. I understand they do not.
- 17 Q. They don't have any employees.
- 18 Did you look into whether they have any
- 19 customers?
- 20 A. I don't know how to answer that question.
- 21 Q. Okay. Well, that's fine. You don't need to,
- 22 if you don't know how to.
- THE COURT: Let's avoid arguing with the
- 24 witness.
- MR. VERHOEVEN: Yes, Your Honor.

```
Let's go to Defendant's Exhibit 735.
 1
 2
        Α.
             Okay.
 3
                  MR. VERHOEVEN: And if we could just
   bring that up on the screen, please.
 4
 5
             (By Mr. Verhoeven) What does the title of this
 6
   document say, sir?
        Α.
             I'm sorry. This is 735?
 8
        Q.
             Yes, sir.
 9
             It's Alcatel-Lucent patent license.
10
             This is a patent -- a real-world patent
11
   license agreement that Google entered into with
12
  Alcatel-Lucent?
        A. Yes.
13
14
             And who is Alcatel-Lucent?
15
            Well, Alcatel-Lucent is a telecommunications
16
   company that was formed from the merger of a French
17
   company called Alcatel and Lucent, a U.S. company.
18
        Q. Another giant telecommunications company,
19
   isn't it?
20
        Α.
             It's very large, yes.
21
             And this is a patent license agreement, right?
        0.
            Yes.
22
        Α.
2.3
             That's what the title says, right?
        Q.
24
        Α.
            Correct.
25
            So it's a real-world license agreement that
        Q.
```

```
Google entered into with this massive company, right?
1
             It's a real world agreement.
2
3
             I direct your attention to Page 16.
                  MR. VERHOEVEN: And the third paragraph
4
5
  down, if you'll bring that out.
             (By Mr. Verhoeven) This is the definition of
6
   the Alcatel-Lucent patents that are being licensed,
   isn't it?
9
        A. I believe so.
             And that's 11 patents, right? You want me to
10
11
   count them?
12
            Well, I'm counting them.
        Α.
             (Witness reviews document.)
13
14
             Yes.
15
             And I direct your attention to Page 5.
16
             You want me to go back?
        Α.
17
             Page 5, which is G172931, talks about how much
        Q.
18
   Google pays, right?
19
        Α.
             Yes.
20
                  MR. VERHOEVEN: Can you bring that out?
21
             (By Mr. Verhoeven) And what does it say?
        Q.
22
             Well, it's got scheduled payments here of $18
        Α.
2.3
  million.
24
        0.
             Six million a year, right?
25
        Α.
             Yes.
```

- Q. Now, the reasonable royalty that you've opined about was for a period of two and a half years.

  A. Yes.
  - Q. Okay. And under this agreement, what Google would have to pay this large corporation, Alcatel-Lucent, for 11 patents is \$6 million a year, right?
    - A. In part.
  - Q. \$6 million a year is what it says right here, right, sir?
- 10 A. Yes.

5

6

7

8

- 11 Q. Okay.
- A. But I'm saying in part in response to your question.
- Q. \$6 million a year.
- Now, you've opined, again, that Google would have agreed to pay Mr. Dean and Ms. Stone \$607 million for only two and a half years, right?
- 18 A. Yes.
- Q. Okay. Isn't it true that that is over \$240 million per year more than what Google agreed in the real world, in this license agreement, to pay
- 22 Alcatel-Lucent, a massive corporation?
- A. I haven't done the math, but I agree. It's a lot. What I'm saying that Google owes -- would go -
  25 owe Function Media would be a lot more than \$6 million a

1 year. Do you dispute that at -- what your opinion 2 3 is, is over 240 million times per year larger than what this actual real-world agreement is? 5 Α. 240 million times? Well, maybe I misspoke. 6 Q. 7 Do you agree, sir -- or let me -- let me 8 withdraw. 9 Do you dispute, sir, that your opinion of 10 \$607.3 million for two and a half years amounts to over 240 million more per year, in your opinion, that Google 11 would have paid these two individuals for two patents 12 than what Google, in the real world, agreed to pay a 13 14 large company, Alcatel-Lucent, for 11 patents per year? 15 Well, I -- I don't disagree that they would pay significantly more under my analysis. 16 17 Do you dispute it's 240 million than this Q. 18 agreement? 19 Α. I don't have a pen, but I can --20 Do you dispute it? Q. Well, I haven't done the math. So I'm just 21 Α. 22 saying, the reason I ask -- I'm saying that is because there's a half a year involved, not a full year. But I 23 24 would agree, for the first two full years, it would be 25 240, more or less.

So we've looked at four real-world patent 1 Q. 2 agreements that Google actually entered into that are 3 license agreements, haven't we, sir? Yes and no. Α. 4 5 The Carl Meyer agreement, Google paid \$3.5 6 million. Α. I'm sorry. Did you say that was a license 8 agreement? 9 The Carl Meyer agreement was more than a 10 license agreement, wasn't it, sir? It was a purchase of the patents. 11 12 Α. That document was a purchase, yes. So it was even more -- it should cost more 13 Ο. 14 than a license, right? 15 Not necessarily. Α. 16 The Carl Meyer agreement, Google paid \$3.5 Q. million to purchase the patents at issue, right? 17 18 Α. Yes, the patents in --19 Ο. And that real --I'm --20 Α. 21 That's a real-world agreement, right? 0. 22 Α. Yes. 2.3 And your opinion is over 173 times more than Q. 24 that for what you think that Google would have paid --

agreed to pay Function Media, right?

A. I agree with you that -- I haven't done the math, but that sounds about right.

3

5

6

16

17

18

20

- Q. And the VoiceAge agreement we looked at, that's a license to over a hundred patents, right, sir?
  - A. I haven't added up the number of patents.
- Q. And Google -- that's a real-world agreement that Google entered into with massive corporations, Nokia, Ericcson, right?
- 9 A. Yes, except we don't know if -- VoiceAge, I
  10 don't believe, is massive.
- 11 Q. And Google paid a maximum of 2 million per 12 year for over a hundred patents, right?
- A. Again, I don't know if it's over a hundred
  patents, but I agree, they agreed to pay no more than 2
  million a year.
  - Q. And that's over -- in your opinion as to what Google would have paid Mr. Dean and Ms. Stone, is over \$240 million more per year than what Google actually, in the real world, in this VoiceAge agreement, agreed to pay for over a hundred patents to VoiceAge and its affiliates, right?
- A. That would be approximately. I agree with you approximately, because I haven't done the math.
- Q. And we looked at another real-world agreement between Google and Hewlett-Packard?

```
1
                  THE COURT: Well, let's -- excuse me for
2
   interrupting you.
3
                  MR. VERHOEVEN: Yes.
4
                  THE COURT: We're going to take our
5
  morning recess at this point.
                  Ladies and Gentlemen, be back ready to
6
7
   come in the courtroom at 10:30.
8
                  Remember my prior instructions -- excuse
9
   me -- and don't talk about the case.
10
                  COURT SECURITY OFFICER: All rise.
11
                  (Jury out.)
12
                  THE COURT: All right. Let's try to
   avoid repetition, okay?
13
14
                  MR. VERHOEVEN: Yes, Your Honor.
15
                  THE COURT: I mean, when you start
   introducing your questions with, and we looked at and
16
17
   again, it's a pretty good indication that you're being
18
   repetitive.
19
                  MR. VERHOEVEN: I appreciate that.
20
                  THE COURT: And I'm giving you some
   latitude because it's cross-examination, but don't be
21
   repeating yourself.
22
2.3
                  And avoid side-bars, okay? I know it's
24
  cross-examination, and you're trying to represent your
25
   client, but I don't allow you to argue with the witness,
```

```
okay?
1
2
                  MR. VERHOEVEN: Yes, Your Honor.
3
                  THE COURT: All right.
                  MR. VERHOEVEN:
4
                                   Thank you.
5
                  THE COURT: We'll be in recess.
6
                   (Recess.)
7
                  COURT SECURITY OFFICER: All rise.
8
                   (Jury in.)
9
                  THE COURT: Please be seated.
                  Let's continue.
10
                  MR. VERHOEVEN: Thank you, Your Honor.
11
12
             (By Mr. Verhoeven) Now, Mr. Bratic, on your
        Q.
13
   direct examination, I recall you gave some testimony
14
   about an acquisition that Google made of a company
15
   called Applied Semantics.
16
             Do you remember that, generally?
             I do.
17
        Α.
18
             Now, the deal between Google and Applied
19
   Semantics, that was an acquisition of an entire company,
20
   wasn't it, sir?
21
        Α.
             Yes.
22
             So that had -- Google bought people, right?
        Q.
2.3
             You don't buy people.
        Α.
24
        0.
             Well, it --
25
             You get --
        Α.
```

- It acquired employees? 1 Q. 2 Α. Yes -- yes. 3 Engineers? 0. 4 Yes. Α. 5 Applied Semantics had products? Q. Yes, it did have a product. 6 Α. 7 Q. Applied Semantics had customers? 8 Α. Yes. 9 Q. They had offices and facilities? 10 They did. Α. 11 The Google acquisition of Applied Semantics 0. was not a bare license agreement, was it, sir? 12 13 Α. No, it wasn't. MR. VERHOEVEN: Let's go to Plaintiff's 14 15 Exhibit 807, and would you go to Page -- I think it's 3; it bears Control No. 4299. 16 17 THE WITNESS: Okay. 18 MR. VERHOEVEN: If we can highlight the 19 bullet there. 20 Q. (By Mr. Verhoeven) There's a reference to 19 21 engineers and 38 to 44 employees, right? I'm sorry. I didn't get the last part. 22 Α. 2.3 There is a reference there --Q.
- Q. -- to the ASI employees who would go and be

Oh. Oh, I'm sorry.

24

Α.

```
hired by Google, right?
1
2
        Α.
             Yes.
3
        Ο.
             So there's an acquisition of employees.
                  MR. VERHOEVEN: Let's go to the next
4
5
  page.
             (By Mr. Verhoeven) You see the title --
6
        Q..
7
                  MR. VERHOEVEN: If we could just
  highlight the -- Charles, just highlight from the
   factors considered to value ASI all the way down to the
10
  bottom.
11
             (By Mr. Verhoeven) And among the factors
   considered to value ASI, you see the second bullet under
12
13
   the first heading, Proven Success of Domain Products.
14
             Do you see that?
15
             I do.
        Α.
16
             Do you know what that's a reference to?
        Q..
17
             Well, they had an AdSense -- excuse me --
        Α.
18
   Applied Semantics had a product.
19
             And this document is saying one of the
   factors -- it's a Google document, right?
20
21
             Yes, this is a Google document.
        Α.
22
             You considered a number of Google documents as
        Q.
23
   part of your opinion, right?
            And this one.
24
        Α.
25
        Q. And this says factors considered when they
```

```
valued this acquisition of an entire company, and they
1
   say proven success of domain products, right?
2
3
        Α.
             Yes.
             Fair to say that that was a factor that Google
4
5
   considered when they decided to do this transaction?
        Α.
             Yes.
6
7
             And so ASI had proved that it had successful
        Q.
   domain products at that time, right?
9
        Α.
            Yes.
             Now, Function Media, in this hypothetical
10
   negotiation, they didn't have any proven success of any
11
  products, did they?
12
        A. No. They had no products.
13
14
             Right.
        Ο.
15
             I direct your attention down to the second
16
   part of this. In the second -- third to last bullet
   there, it says establishes Southern California product
17
18
   development center.
19
             Do you see that?
20
        Α.
             Yes.
21
             So -- and above that, it says synergies with
   Google.
22
2.3
             Do you see that?
24
        Α.
             Yes.
25
            So one of the synergies is it would help
        Q.
```

```
establish a Southern California product development
1
2
   center, if Google did this acquisition. Fair?
3
             It appears to be the case.
             Now, in this hypothetical negotiation that
4
5
   you've given your opinion about, Mr. Dean and Ms. Stone,
   they don't have any product development center, do they?
6
7
        Α.
             No.
8
             Don't have any -- any products even?
9
        Α.
             Not as far as I know.
10
        Q.
             Okay.
11
                  MR. VERHOEVEN: Let's go to PX441.
12
             I'm sorry. 441?
        Α.
             (By Mr. Verhoeven) Uh-huh.
13
        0.
14
             And if we could go to --
15
             I'm sorry. Let me find my copy.
        Α.
16
             Certainly. Take your time.
        Q.
             Okay. I've got it. Thank you.
17
        Α.
18
                  MR. VERHOEVEN: And if we could go to
19
   Page 4 of 18, G14470, and highlight from why Google
20
   acquired ASI on down.
21
             (By Mr. Verhoeven) And you'll see again, this
22
   is a Google document, right?
2.3
             It's the same document.
        Α.
24
             And it says why Google acquired ASI, right?
        0.
25
        Α.
             Yes.
```

- Q. And then one of the reason listed is proven success of domain products, right?
  - A. Yes.

7

8

9

16

Q. The next bullet: Increasing traction of ASI news and enterprise solutions.

Do you see that?

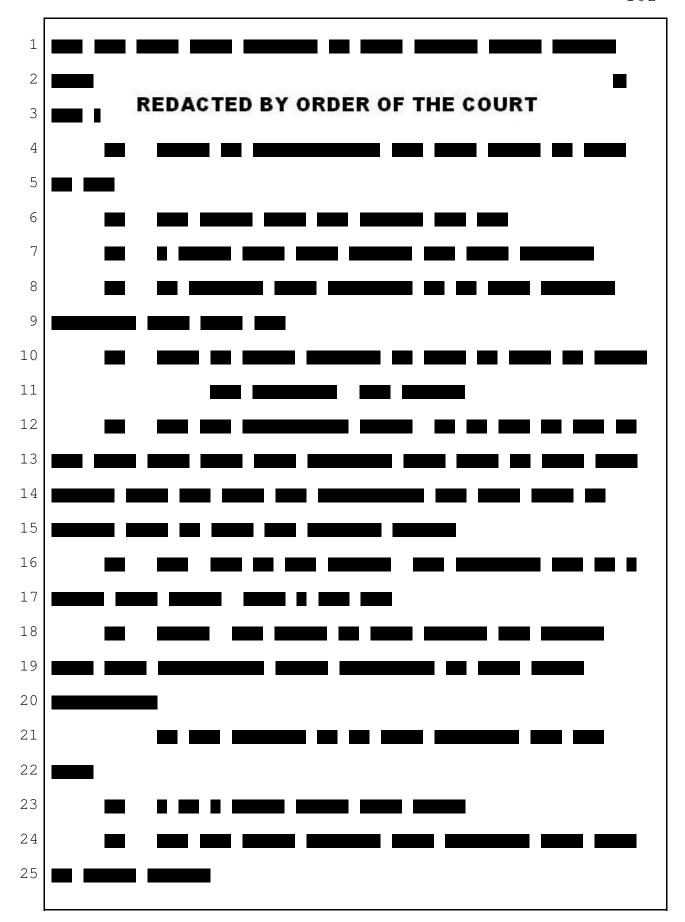
- A. I do.
- Q. What's your understanding of what that refers to?
- A. Apparently, Applied Semantics had some kind
  of -- I'm not sure what the news is, but enterprise
  solutions, they had some kind of products for companies
  to use.
- Q. And that was the reason -- one of the reasons
  why Google acquired them, right?
  - A. It was one of the reasons, yes.
- 17 Q. Right.
- And if you look down below that, the second
  bullet in the next section says: Google will be able to
  grow its engineering presence and recruiting efforts in
  the Southern California region.
- Do you see that?
- 23 A. Yes.
- Q. So that's one of the synergies to Google of acquiring an entire company here is that Google will be

able to grow its engineering presence by acquiring this 1 2 company in Southern California, right? 3 Α. Yes. Okay. Now, in your hypothetical negotiation, 4 5 this is just supposed to be a bare patent license, not an acquisition of a whole company, right? 6 7 Α. Correct. 8 And in your hypothetical negotiation, you 9 would agree with me that Function Media does not have 10 any engineering presence? Function Media, yes. 11 Α. They do not have one, right? 12 13 Yes, they do not have an engineering presence Α. 14 as far as I know. 15 All they have are the two patents, right? Q. 16 Α. Yes. Nothing else? 17 Q. 18 I -- I thought Mr. Dean said that Function Α. 19 Media held some other patents. 20 In our hypothetical negotiation, is that relevant? 21 22 Α. No, but --2.3 Q.. Okay. 24 -- I was just responding to your question. Α. 25 Okay. So in our hypothetical negotiation, all Q.

```
we're talking about acquiring is a license that's
 2
  non-exclusive for just those two patents, right?
 3
        Α.
            Yes.
            And only for two and a half years, right?
 4
 5
            Well, under Georgia-Pacific, it's presumed
        Α.
  that the license is for the life of the patent.
 6
            Well, your number is only for two and a half
        Q.
   years?
9
            Yes, because we're here in trial today.
10
            Okay. You also talked about another
11
  acquisition, dMarc.
12
             Do you remember that generally?
13
        Α.
            DMarc Broadcasting.
14
        Ο.
            Yes.
15
                  MR. VERHOEVEN: DX357, please.
16
             I don't think that's in my binder, but -- did
        Α.
17
   you say 357?
18
       Q. (By Mr. Verhoeven) 354 -- I misspoke,
19
   Mr. Bratic. I apologize. PX354.
20
        A. Okay.
21
             Is that in your binder, sir?
            354 is.
22
        Α.
2.3
             Okay. And this is a Google document, correct?
        Q..
            It is.
24
        Α.
25
        Q. And this is a reference to -- this concerns
```

the dMarc acquisition? Α. Let me take a quick look. I don't see any reference to dMarc in these two pages that you've given me. REDACTED BY ORDER OF THE COURT 

REDACTED BY ORDER OF THE COURT MR. VERHOEVEN: Let's go to the second page of this document. That's Control No. 770 at the bottom. Α. Yes. MR. VERHOEVEN: And let's highlight the first bullet all the way down through the sub-bullets, Charles. 



## 1 REDACTED BY ORDER OF THE COURT 2 MR. VERHOEVEN: Now we can take that off the screen, Charles. 3 (By Mr. Verhoeven) Now, you testified on 4 5 direct about what you called industry royalty rates. Do you remember that generally? 6 7 Α. Yes. 8 Something you found in a publication called Q. Licensing Economics Review. 9 10 Do you recall that? I do. 11 Α. Q. You have no evidence, sir, that those rates 12 13 are for analogous inventions to the inventions in this 14 case, do you? 15 No. Not as to the specific inventions, no. Α. 16 And you have no evidence that those rates are Q. for bare patent licenses, do you? 17 18 Α. No. 19 They're for lots of different things, aren't 20 they? Software, technology? 21 Oh, yes. Α. 22 Things that aren't patents, right? Q. 2.3 Well, they would include software patents and Α. the like. 24 25 Q. They're not just bare patent licenses, are

they? 1 2 No, they're not. 3 Would agree with me that somebody would pay more to license intellectual property if they got not 5 just a patent but also the technology and the software and the engineers and the know-how? 6 7 No, not necessarily. Α. 8 Oh, you think that they wouldn't pay more for 9 that? 10 It depends on the circumstances. Do you think Google would pay more in a 11 hypothetical negotiation if Function Media actually had 12 a working product that people liked and used and had 13 14 thousands of impressions per day? 15 Do you think that might be more valuable to 16 Google? 17 No, it wouldn't matter. Α. 18 Q. Wouldn't matter? 19 Α. No. 20 Wouldn't matter, in your opinion, to Google's Q. 21 assessment of how much the technology was worth, whether 22 all you had was Mr. Dean and Ms. Stone and a couple of patents versus a functioning product that had millions 23 24 of impressions per day, that worked well, and customers 25 liked?

That wouldn't make a difference to Google? 1 2 Well, it would because that's exactly what Google had. 3 In the hypothetical negotiation, sir, do you 4 5 think it would be more valuable to Google if Function Media had all those products and all that success, other than just the two patents? 8 No, it wouldn't matter. 9 Ο. Wouldn't matter? 10 Α. Because then we'd be talking about lost profits. 11 12 Oh, okay. So it's your testimony that Google wouldn't value that higher than Google would value a 13 14 hypothetical negotiation where there was no product, no 15 facilities, no employees, just two bare patents? 16 Α. Not under the facts of this case, no. Okay. Now, these industry rights, you -- your 17 slide showed that you used -- I think it was a hundred 19 different licenses they were based on. 20 Do you remember that? 21 Α. Yes. 22 You didn't study those licenses, did you? Q. 2.3 Α. No. 24 Ο. Didn't even read them, did you?

25

Α.

No.

- Q. You don't know if they're bare patent licenses or software licenses, do you?
  - A. I do know.

- Q. Okay. Which ones are bare patent licenses and which ones are software licenses?
  - A. What I do know is the document itself says internet licenses, parenthesis, including software. So I know they include internet software licenses.
- 9 Q. So you know they include software, which isn't 10 part of the hypothetical negotiation, right?
- 11 A. Well, software itself is not.
- 12 Q. So that's a yes?
- 13 A. Yes.
- Q. Okay. You don't know anything about the terms of the hundred and some licenses, whether they're exclusive, non-exclusive, right?
- 17 A. That's correct.
- 18 Q. Never even read them?
- 19 A. That's correct.
- Q. But you're relying on this?
- 21 A. In part.
- MR. VERHOEVEN: Now, I'm trying to stay
  organized, Your Honor, but I misplaced a paper. I want
  to make sure that I'm organizing this so we can minimize
  the amount of time we have to have jurors -- or the

```
people out of the room.
 1
                  THE COURT: I understand.
 2
 3
             (By Mr. Verhoeven) All right. Let's talk a
        Q..
   little bit about the Stanford license. You talked about
 5
  the Stanford license in your direct exam.
             Do you remember that?
 6
 7
        Α.
             Yes.
 8
        Q.
             Now, that --
 9
                  MR. VERHOEVEN: Let's bring up DX689,
10
   please.
11
                  And just can we highlight the title in
   the first paragraph, please?
12
13
        0.
             (By Mr. Verhoeven) This is the agreement you
14
   were testifying about yesterday, right?
15
        Α.
            Yes.
16
        Q. And this is dated December 1, 1998, right?
17
            Yes.
        Α.
18
        Q.
             What's the date of the hypothetical
19
  negotiation?
20
        A. It's July 2007.
21
            July 2007. So that's nine years later?
22
        Α.
            Yes.
2.3
             Okay. Would you agree with me that the
        Q.
  internet and the industries surrounding the internet
25
  were vastly, exponentially different in 2007 than they
```

```
were in 1998?
1
2
        Α.
           Well, I would agree. The internet grew a lot
   in that time period.
3
            What you could do was completely expand it,
4
5
   wasn't it?
             I'm not sure what you mean by --
6
7
             Well, by 1998, you didn't have broadband, did
        Q..
8
   you?
9
        Α.
             I'm not so sure.
            You couldn't watch -- you couldn't have a good
10
   user experience watching graphics or video on the
11
   internet, could you?
12
13
        Α.
             It's a while ago. I can't say for certain.
             You're not sure?
14
        Ο.
15
             I'm just saying I can't say for certain.
16
             Would you agree with me that the environment
        Q..
   in this industry, in the internet world, was vastly
17
   different in 1998 than it was in 2007?
19
             Yes, I'll say it was very different.
20
        Q.
             Okay.
21
             It's grown an awful lot. It's become much
22
   more important.
2.3
            And the things that you could do on the
24
   internet have advanced greatly, haven't they?
25
            Yes. You mean since 1998?
        Α.
```

```
Q. That's right.
```

- A. Yes. They advance every year.
- MR. VERHOEVEN: Now, let's put up DX Demo
- 4 54.

1

2

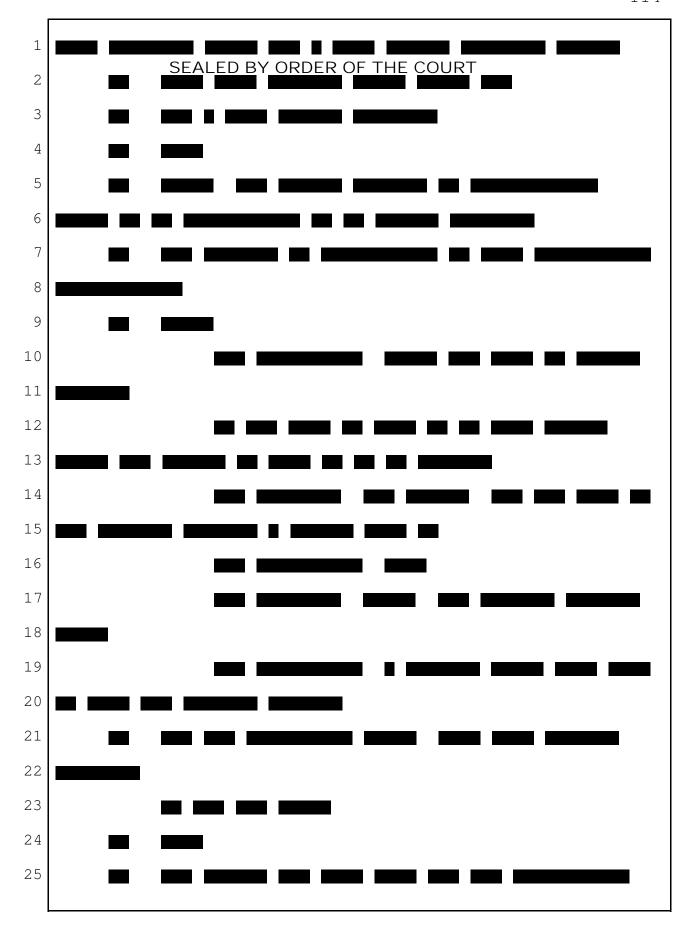
- 5 Q. (By Mr. Verhoeven) And you can stay on this
- 6 document, sir. I just have a demonstrative slide to
- 7 illustrate what I think the terms of the actual
- 8 agreement were in 1998.
- 9 A. I'm sorry. Can you tell -- bear -- just bear
- 10 with me. Let me go -- what is that; Section 8.1 you're
- 11 talking about?
- 12 Q. Yeah.
- 13 A. Okay.
- 14 Q. Do you dispute, sir, that the value of this
- 15 deal in 1998 was \$180,000?
- 16 A. Yes.
- 17 Q. You do dispute that?
- 18 A. Yes.
- 19 Q. Okay. Do you dispute that 2 percent of \$8
- 20 million is \$160,000?
- 21 A. I don't dispute that math.
- Q. And 8. -- Section 8.1 talks about 2-percent
- 23 equity of issued shares after the round of investor
- 24 financing which resulted in 8 -- in 8-million-dollar
- 25 post-money valuation.

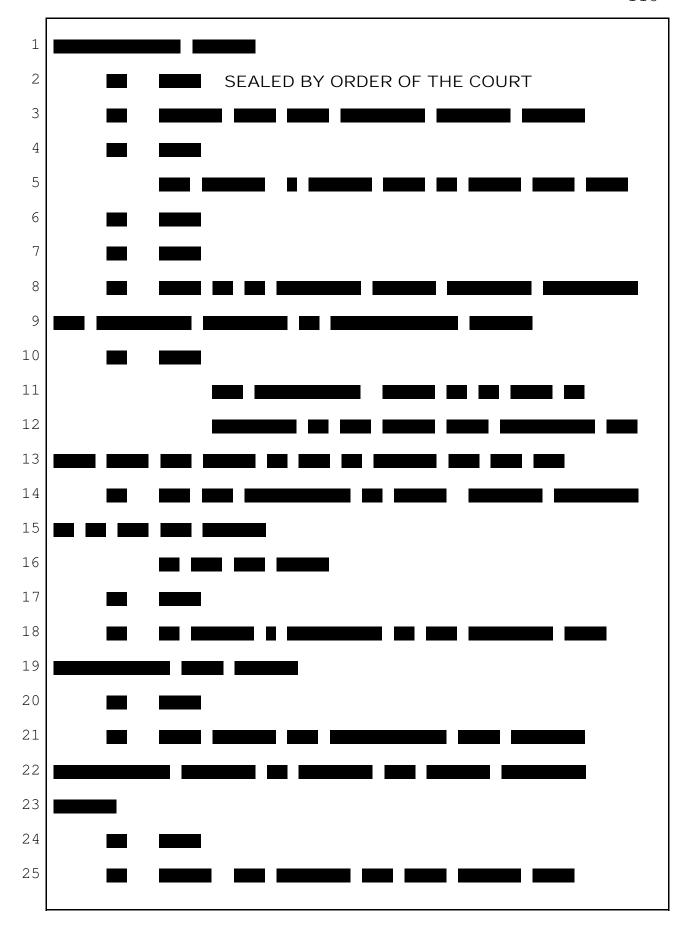
```
Do you see that?
1
             Yes, I do.
2
        Α.
3
             Okay. And if you do the math, it comes to
        Q.
   $160,000.
4
5
             I agree; 2 percent of 8 million is 160,000.
        Α.
             And then the issue royalty is $20,000, right?
6
        Q.
7
             Yes, initial payment.
        Α.
8
        Q.
             And then the exclusive period royalty is
9
   $50,000?
10
        Α.
             Yes.
11
        0.
             Okay. That was the terms of the deal in 1998,
12
   correct?
13
        Α.
             No, not quite.
14
             Does that -- is that what 8.1 and 8.2 say,
15
  sir?
16
             Not the way you've characterized it.
        Α.
17
             Okay. Does 8.1 say Google agrees to pay
   Stanford a non-credible, non-refundable license issue
19
   royalty of $20,000?
20
        A. Yes.
21
             In addition, Google agrees to issue to
   Stanford shares of Google stock equivalent to 2-percent
22
23
  equity of issued shares after the round of investor
   financing which resulted in an 8-million-dollar
24
25
  post-money valuation.
```

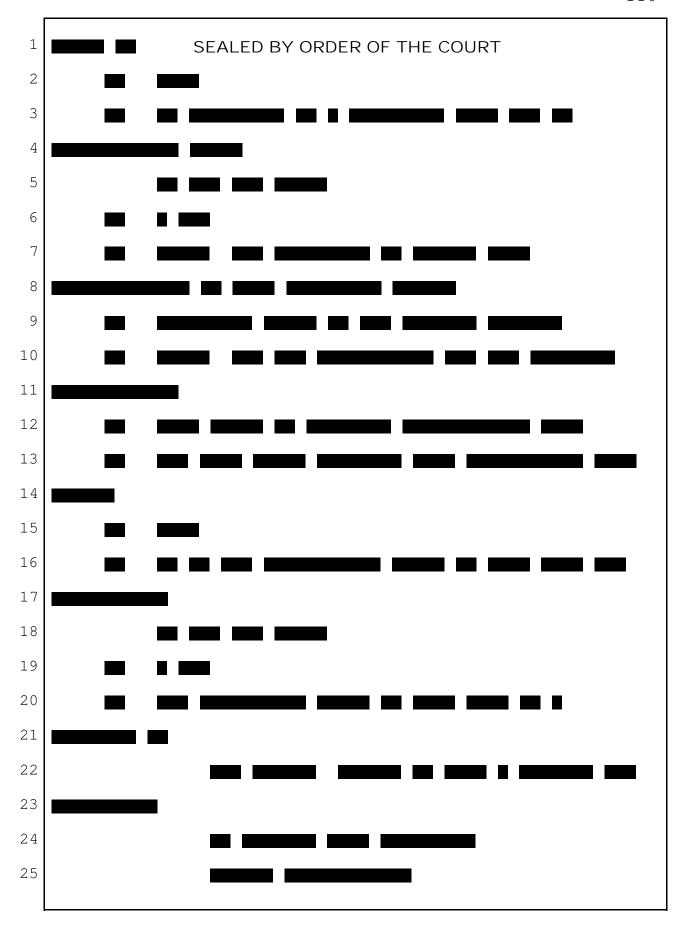
```
1
             Do you see that?
2
        Α.
             I do.
3
             That's what -- so that says that Google agrees
        Q.
   to give Stanford 2 percent of $8 million, right?
4
5
             That's not the whole story.
        Α.
             Is that what it says, sir?
6
        Q.
7
             That's not all it says.
        Α.
8
             What else does it say in 8.1?
        Q.
9
             What it says in 8.1 is Google only gets that
10
   2 percent of stock, if Stanford is able to raise $8
  million in funds. In other words, a 2-percent equity is
11
   contingent and dependent on Stanford going out and
12
13
   raising $8 million.
14
             So at the time that agreement was executed,
15
   that $8 million wasn't in place.
16
             So that might not even happen?
        Q.
17
             Correct.
        Α.
18
             Okay. But if it does, it's $160,000?
        Q.
19
        Α.
             Well --
20
        Q..
             That's what the math adds up to, sir.
21
             That's what the math adds up to.
        Α.
22
             And that's the transaction in 1998, sir,
        Q.
23
   right?
24
        Α.
             Yes.
25
             Now, your testimony talks about how Google's
        Q.
```

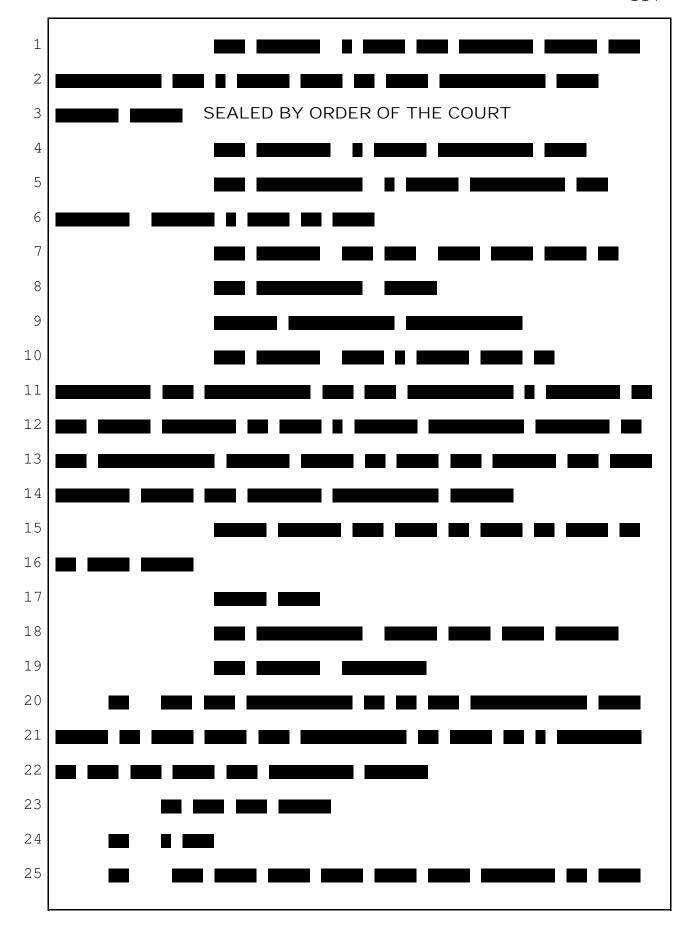
```
stock has grown over the years, but no one knew in 1998
1
   whether Google would be one of the millions of dot com
2
3
  companies that bailed in the dot com bust, did they?
             Nobody knew, no, for certain.
4
        Α.
5
             And would you agree with me that startup
        Q.
   companies, the vast majority of startup companies, fail?
6
             I would -- I don't know if I could say the
8
   vast majority but a lot of them do.
9
        Q.
             Yeah, especially where Google comes from,
10
   right?
           In the Bay Area?
11
             In the Silicon Valley area, a number of them
        Α.
12
   failed.
            That's true.
            Well over 50 percent.
13
        0.
14
             That I can't say. I don't have --
        Α.
15
             You can't say?
        Q.
16
        Α.
             I just know a lot.
17
             Okay. Fair to say that Google and Stanford
        Q.
   had no idea in 1998 that their stock would be worth a
19
   lot of money 10 years later, did they?
20
        Α.
             I agree with that.
             Okay. The deal they struck was a deal in
21
        0.
22
   1998, right?
2.3
        Α.
             Yes.
24
             And these are the terms of the deal they
        0.
25
   struck in 1998, right, sir?
```

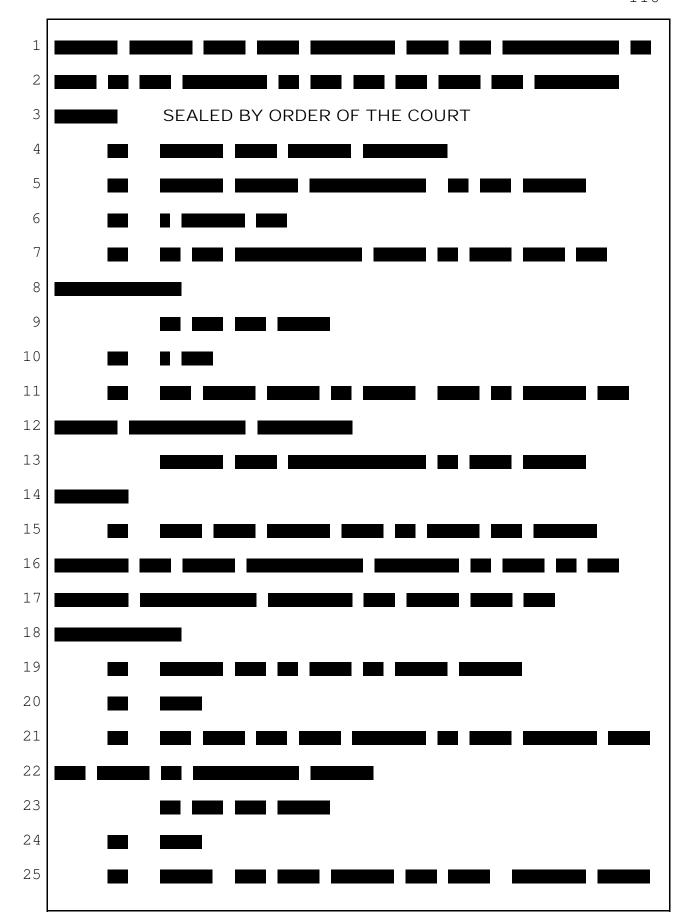
```
Α.
             The terms in Section 8.1, yes.
1
             Okay.
 2
        Q.
3
                  MR. VERHOEVEN: Your Honor, at this
 4
   point, I'm going to request -- we're going into the same
 5
   subject matter areas.
6
                   THE COURT: Okay. Folks, I'm going to
 7
   have to ask you to excuse yourself at this time, and
   I'll call you back in once we've concluded with this
9
   line of testimony.
10
11
                 SEALED BY ORDER OF THE COURT
12
13
14
15
16
17
18
19
20
21
22
23
24
25
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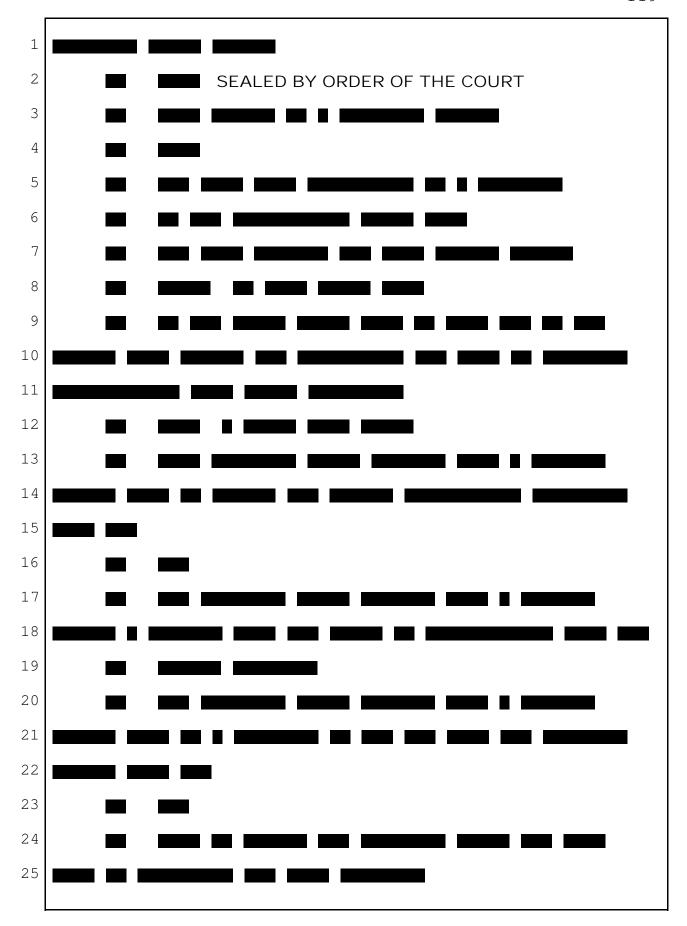


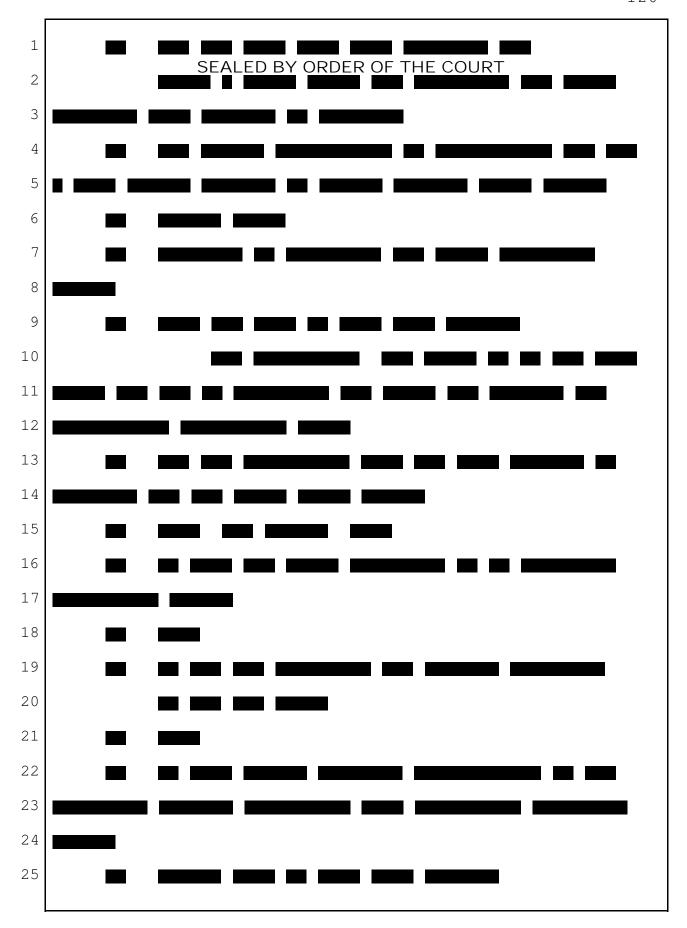


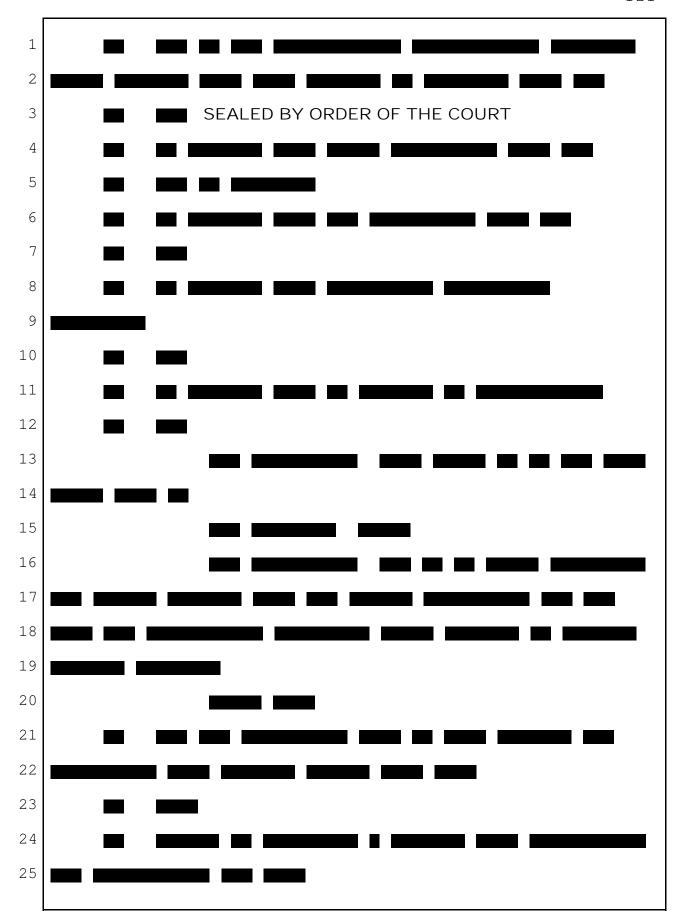


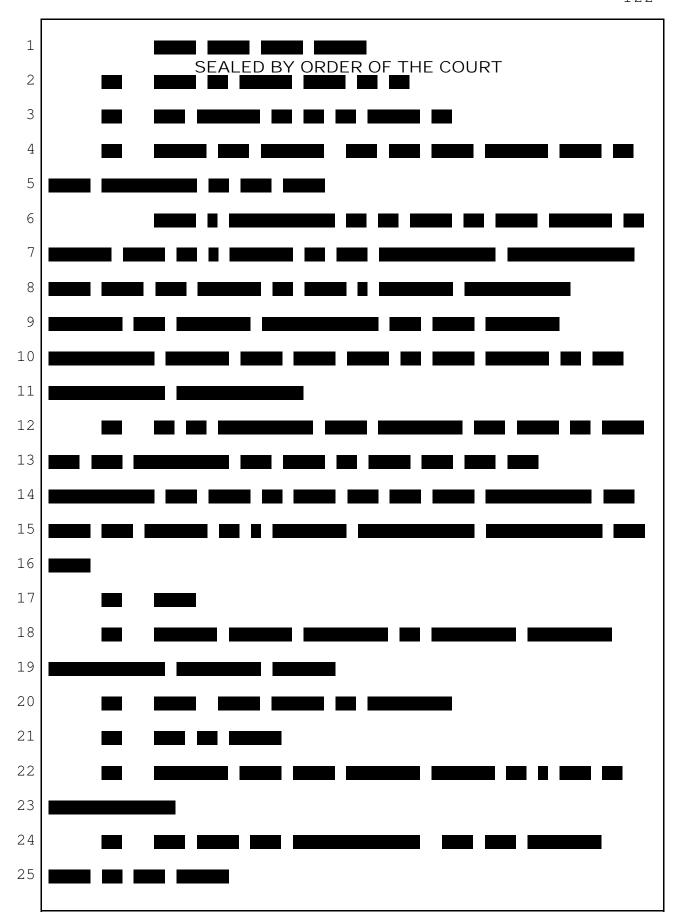


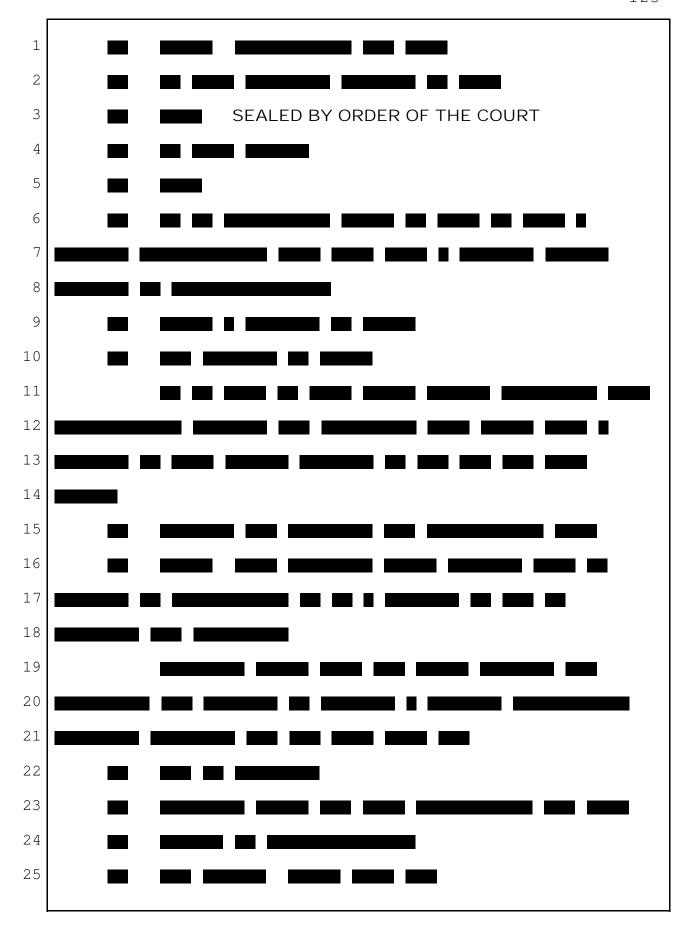


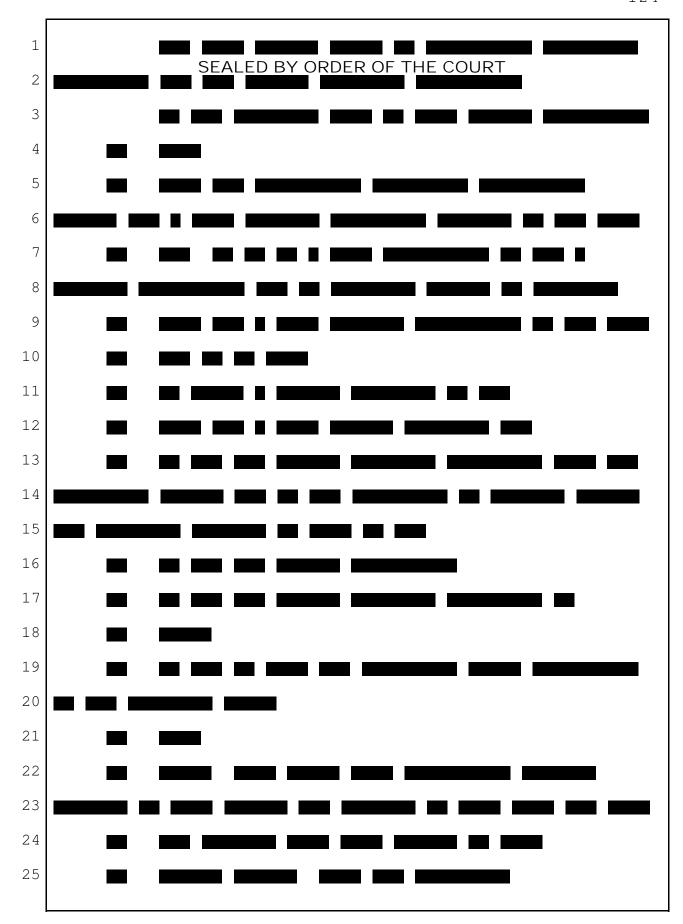


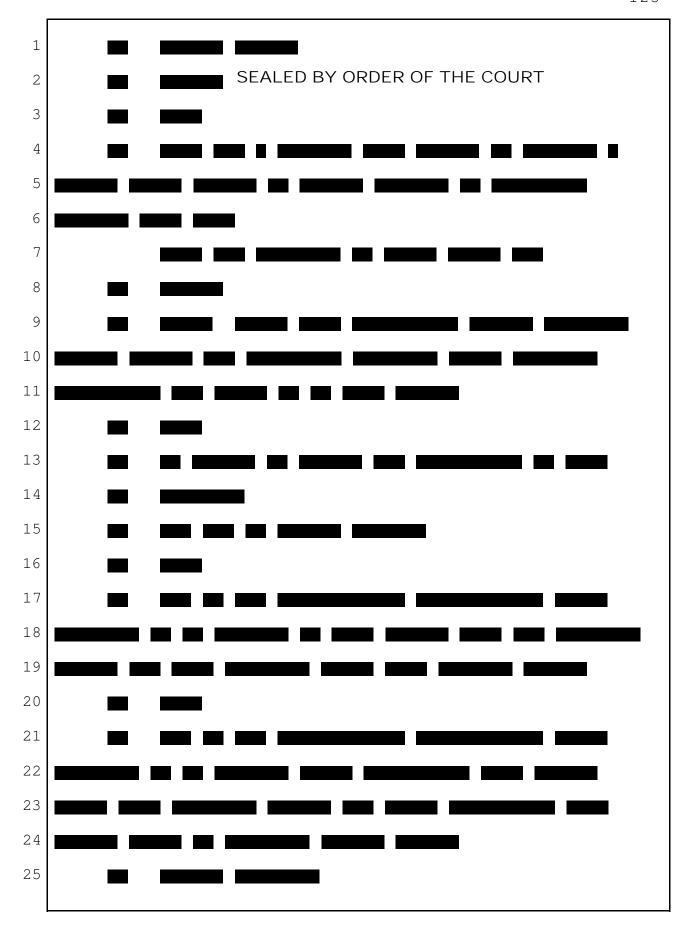


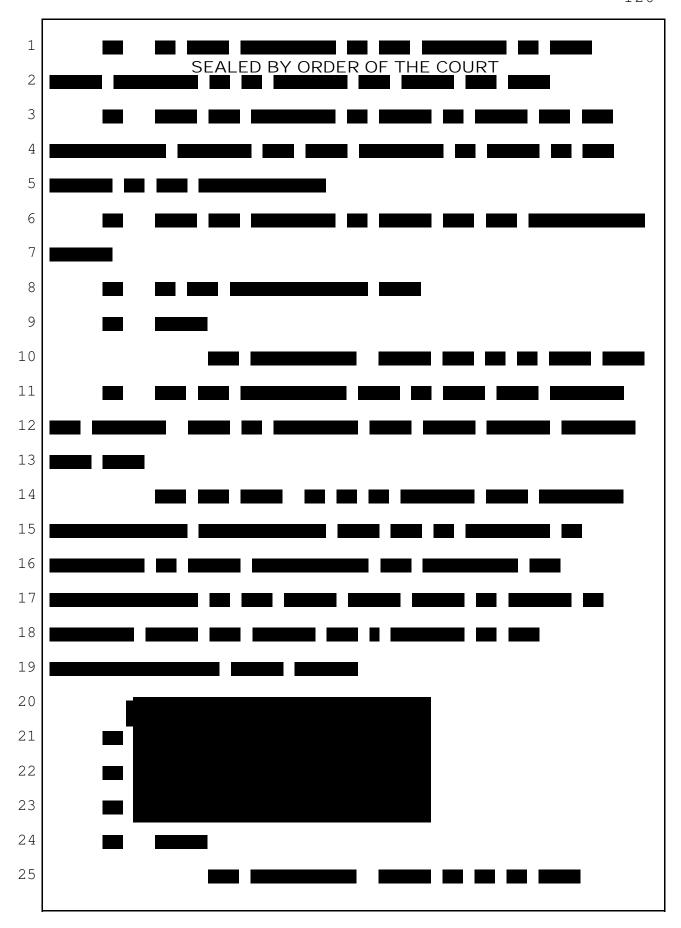


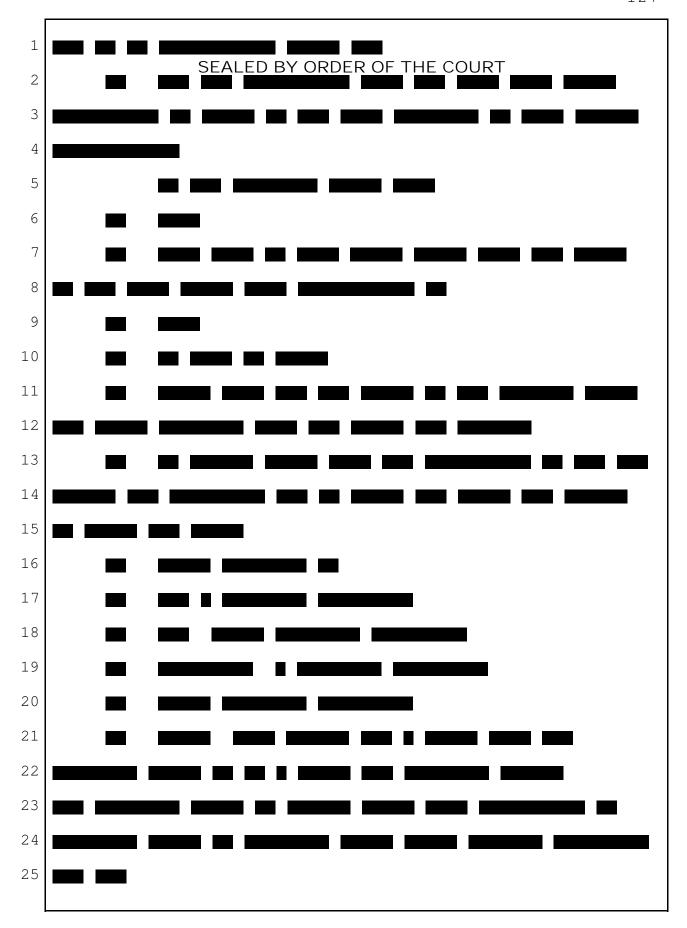


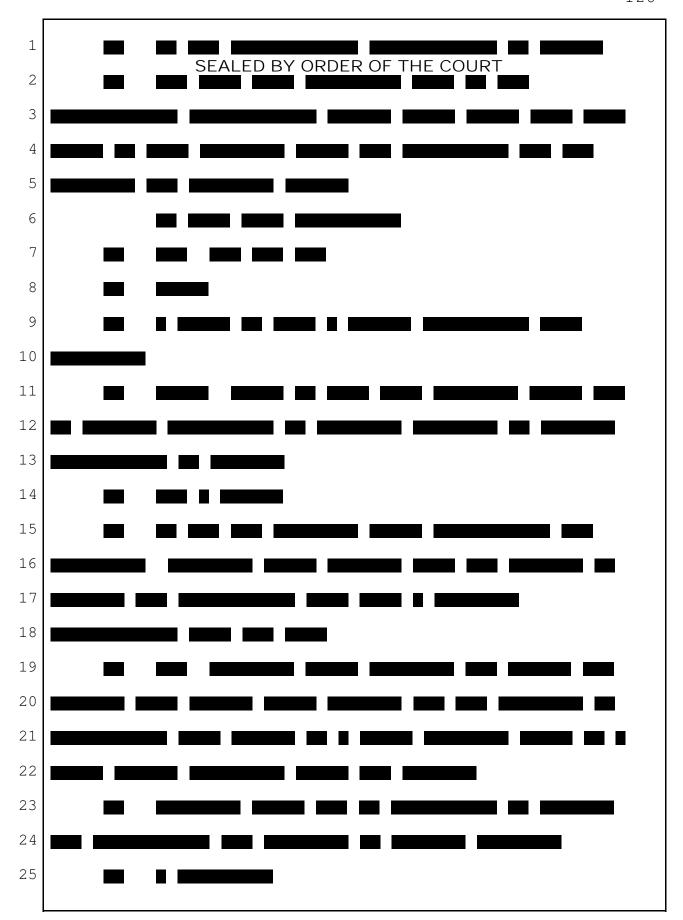


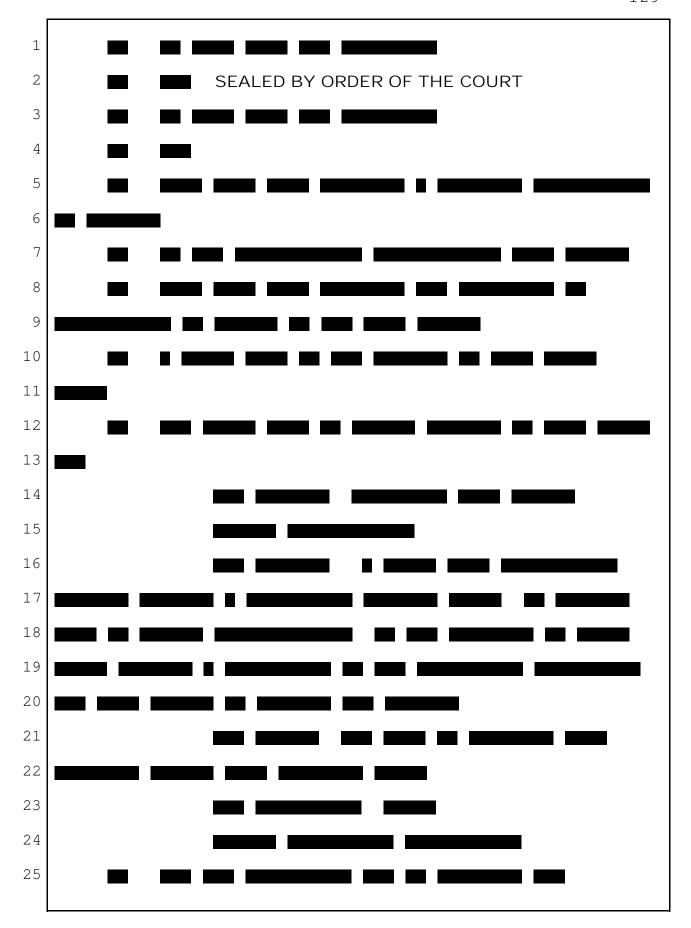


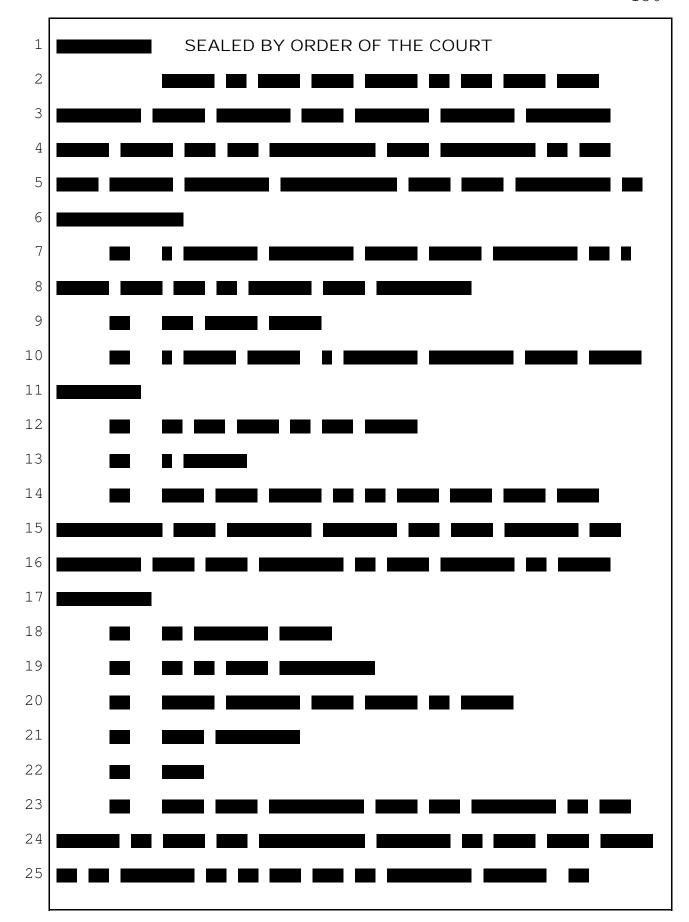


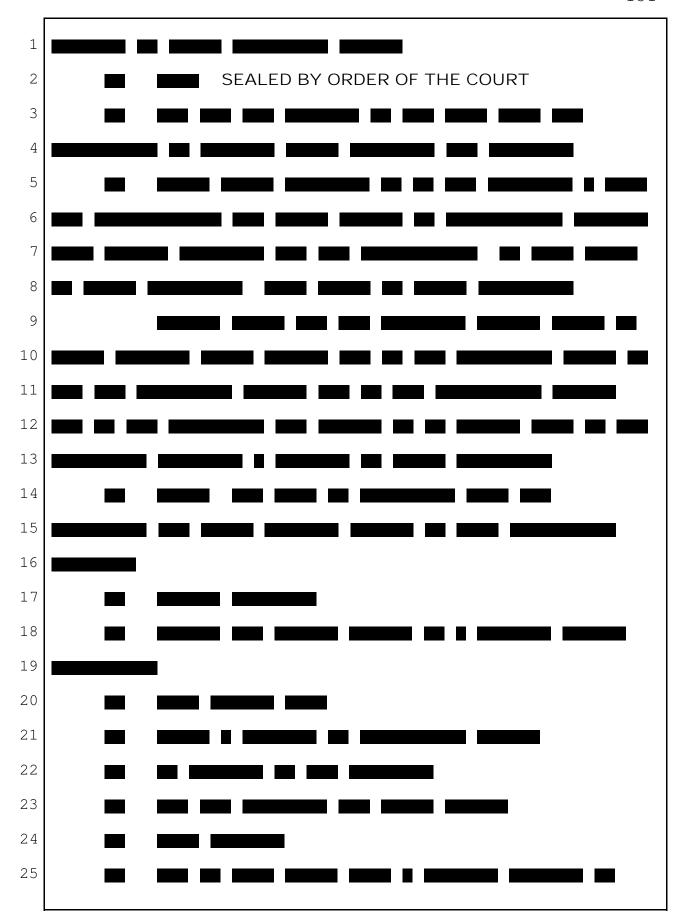


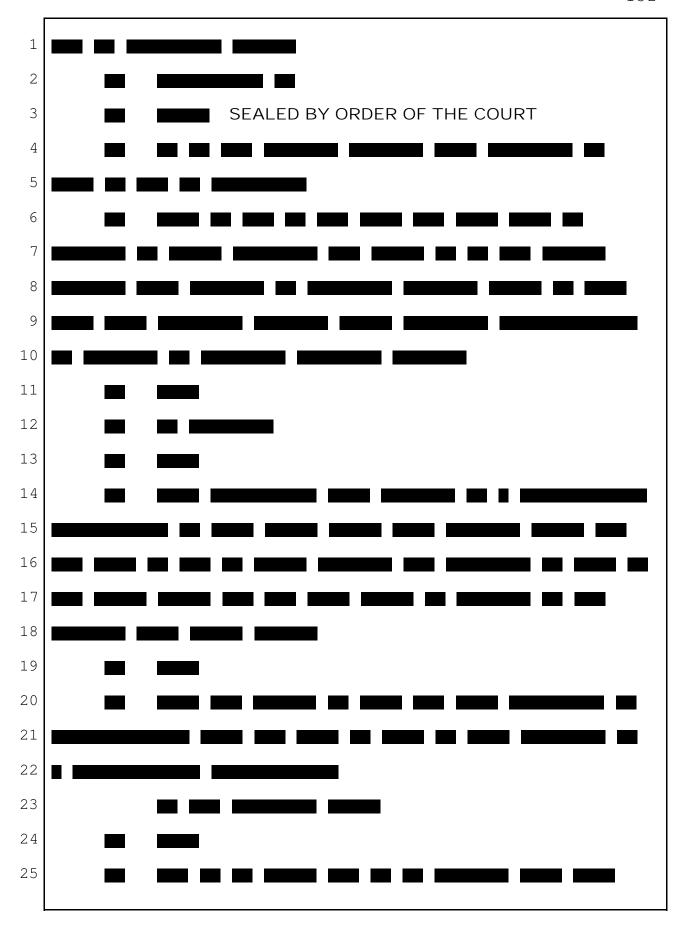


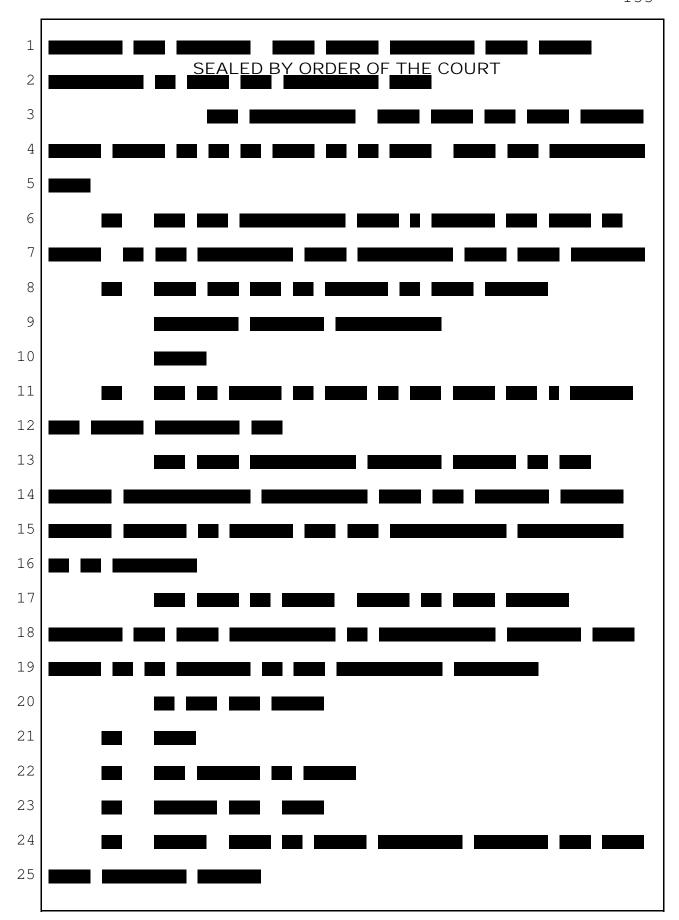


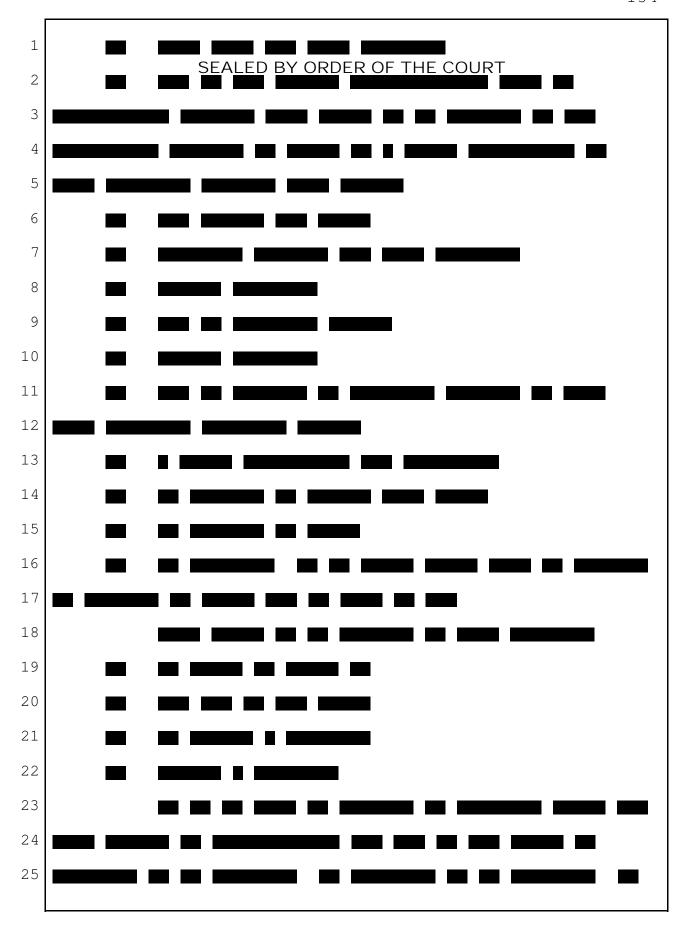


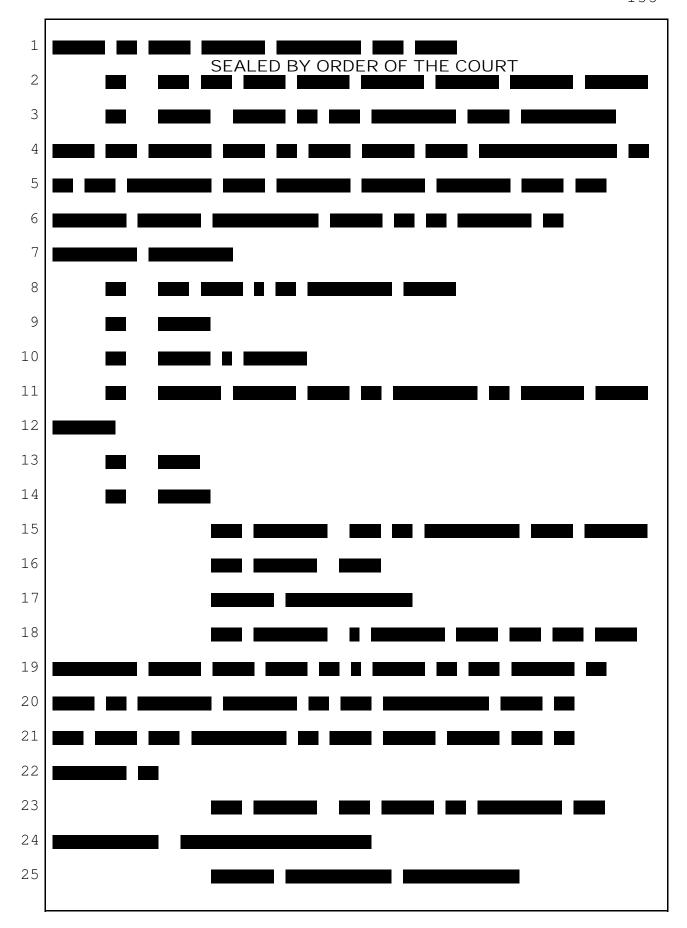


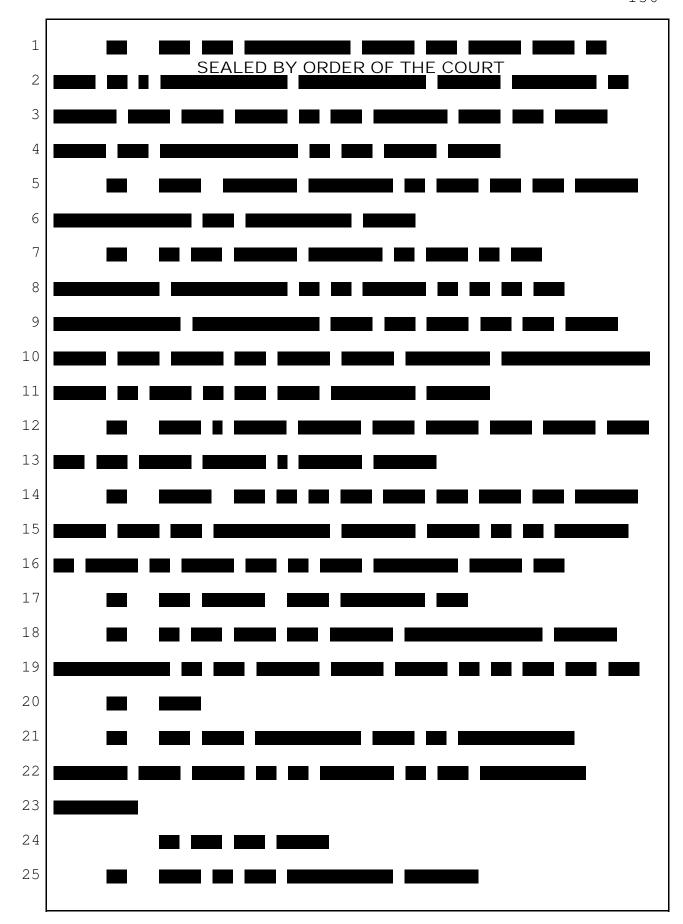


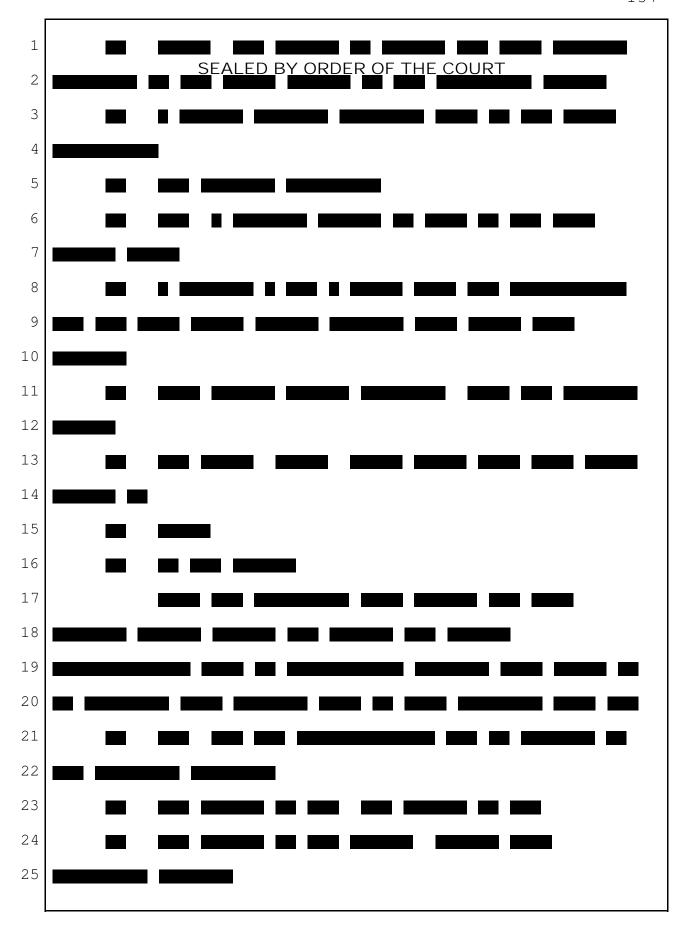


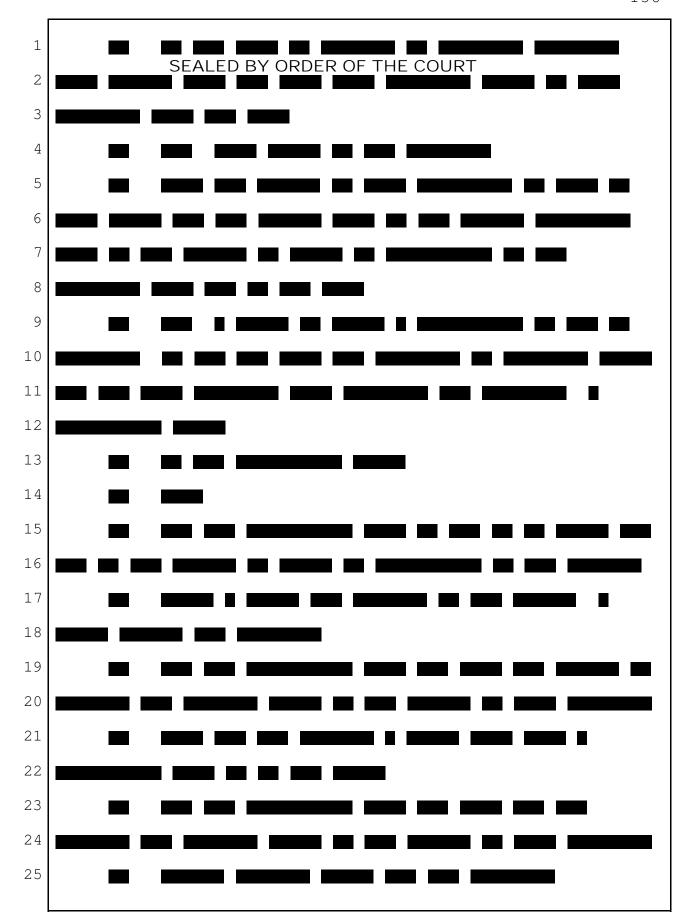












MR. VERHOEVEN: Thank you, Your Honor. (By Mr. Verhoeven) Now, on your direct examination, you did a comparison of a nonaccused product, AdSense for Content Direct --Α. Yes. Q. -- with AdSense for Content Online. Do you remember that, generally? Yes. Α. Now, AdSense for Content Direct, did you know that the customers for Google that primarily comprise AdSense for Content Direct are powerful industry advertisers?

- A. I understand they're large companies.
- Q. Yeah. Large companies --
- 3 A. Yeah.

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- 4 Q. -- right?
- 5 A. Yes.
  - Q. And did you understand that Google can't simply tell these companies: We want you to use our automated service because it's more profitable?
- 9 A. I'm sorry?
- 10 Q. Did you understand -- do you understand,
- 11 Mr. Bratic, that Google can't simply tell these large
- 12 advertising companies: We want you to move over to
- 13 on -- the online service, because it's more profitable
- 14 for us?
- Do you understand that?
- 16 A. Not from the documents I saw.
- 17 Q. You think that -- that Google can simply tell
- 18 these major advertising companies, who want to do direct
- 19 advertising, that we're not going to do that; you got to
- 20 go and use our online service just because it's more
- 21 profitable for us?
- A. No, that's not my testimony.
- Q. Okay. They couldn't do that, could they?
- A. I don't understand the question.
- 25 Q. In the real world, if you have major customers

- who prefer Product A, you can't just say: We're going 2 to move you to Product B because it's more profitable, 3 can you? Depends on the circumstance. 4 5 Well, if they say no and they're one of your Q. major customers, you're going to lose the customer, 6 right? 8 Maybe; maybe not. It depends if they have a 9 choice. 10 Q. Okay. You don't know one way or the other. 11 Α. Right. 12 You can't simply assume that we can just move Q. 13 all these major advertisers out of their preferred product into another product that's more profitable, and 14 15 there's no problem there, can you? 16 Α. No. I never did assume that. Okay. Do you think maybe the difference in 17 profitability between AFC Online, AdSense for Content 19 Online, the accused product, and AdSense for Content 20 Direct, which has all the major advertisers -- do you 21 think maybe the difference in profitability is that the major advertisers have more power and can negotiate a 22 23 better deal?
- A. Oh, yes, I'm sure that's part of it.
- Q. And that's part of the reason why AdSense for

Content Direct is less profitable, isn't it, sir? 1 AdSense for Content Direct? 2 3 Ο. Yes. Yes. 4 Α. 5 That's one of the reason it's less profitable Q. than AdSense for Content Online, right? 6 Well, right, because -- yes, because Google has more control over its AdSense for Content Online publishers. 9 10 Right. And those publishers happen to be a lot smaller than the AdSense for Content Direct 11 publishers, don't they? 12 13 A. Yes, they do. 14 Okay. So you can't simply take the 15 profitability or lack thereof of the nonaccused product, AdSense for Content Direct, and say, well, we can just 16 move all those guys over for to AdSense for --17 18 MR. VERHOEVEN: Sorry, Your Honor. 19 the thing. 20 Q. (By Mr. Verhoeven) We can just take all these products over and move them for AdSense for Content 21 22 Online and be a wash. No problem. 2.3 That's not realistic, is it, sir? 24 Well, I never said that. Α. 25 Q. And it's not realistic, is it?

A. No.

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- Q. Now, you said that, in your opinion, there aren't any noninfringing substitutes to these patents.
  - A. Acceptable noninfringing substitutes.
- Q. Thank you. You said there are no acceptable noninfringing substitutes. And your opinion is based 100 percent on somebody else's testimony, right?
  - A. Yes. Dr. Rhyne.
  - Q. So it's not -- you're just pointing to him,
- 10 right?
- 11 A. Yes. I'm not a technical expert. I'm relying
- 12 on him.
- Q. Okay. Did you ever hear of AdForce?
- 14 A. Yes.
- Q. Did you know that AdForce was out, and people were doing it before the patents had issued in this
- 17 case?
- 18 A. I don't know when people were doing AdForce.
- 19 Q. Did you know that AdForce was a fully
- 20 automated system?
- 21 A. I don't know that to be true.
- Q. Did you know AdForce had a publisher interface
- 23 and a seller interface?
- A. The specifics, I don't recall.
- 25 Q. Did you know that AdForce didn't get a patent

on its technology so people could use it without 1 2 violating their patent? 3 I did not make an investigation of AdForce's patent. 4 5 You didn't look into that? Q. I don't recall. 6 Α. 7 Now, if -- if it turns out that I'm right, Q. AdForce was out there, and it did this functionality, it's fully automated, and Google could use it for free, 10 that would be an alternative for Google instead of signing a license in the hypothetical negotiation, 11 right? 12 13 Α. Not necessarily. 14 It could be, couldn't it? 15 Well, we don't know, because you don't know 16 what terms AdForce would agree to, and you don't know whether AdForce's technology is comparable. 17 18 Well, let's assume that it had the same Q.. 19 automatic technology that we're talking about. 20 would be a noninfringing substitute, right? 21 If it had the same functionality. Α. 22 Now, it's interesting you talk about 23 functionality. By functionality, do you mean the claim elements? 24

25

A. Not at all.

Q. Okay.

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- I mean the characteristics. In other words --Α.
  - The characteristics. Ο.

So what are the characteristics that you think 5 is the functionality that can't be designed around?

- Well, I'm not a technical expert, so I'm not sure what you want me to --
- Q. Well, you told -- I'm sorry. Go ahead and finish.
- 10 Α. No. I'm just saying -- I don't want to give you a long answer, so why don't you please restate your 11 question. 12
- Q. What are the technical characteristics you 13 14 just referred to that would be an acceptable 15 noninfringing substitute that you've concluded aren't 16 available to Google?
- 17 I've just told you, I'm not a technical 18 I'm relying on Dr. Rhyne regarding the 19 technical aspects of that issue.
- 2.0 Q. You've told the jury that there's no 21 acceptable noninfringing substitutes.
- Α. 22 Yes.
- 2.3 Okay. What are the features that you think are the accept -- the functionality that would be 25 acceptable that can't be designed around?

A. Okay.

- Q. Can you tell us that?
- A. Yes, I can, just with the caution that I'm not a technical person, so I'll explain to you what I understand.
  - Q. Okay.
- A. And so I'll give you just a general overview. My understanding is, what's critical and core and fundamental about the patents-in-suit is that they have taught a method -- a way of taking -- allowing advertisers to -- on a self-service, fully automatic basis, loading information regarding their preferences for how they want their ads -- what they want their ads to have in them, and then here on the other side -- imagine three wheels.

You have one wheel out here, which is the advertisers, completely automated, doing their thing, completely loading in all their advertising information with no human intervention.

Imagine another wheel over here, which are publishers. Publishers are putting in all their publication -- what are called publication rules, meaning the look, the feel, the font, the color, the background of their website, how they want the ads to match both the color, the texture, everything, so that

there's a seamless introduction of the advertisement 1 when it pops up on that customer's website. 2 3 That's a completely different and completely independent wheel, again, taught by the patents. 4 5 The third wheel or circle in the middle is where both of those publisher and advertiser wheels or 6 circles come together in a completely self --8 self-contained, automated fashion and allow for the 9 creation -- automatic creation of advertisers --10 advertisements that then end up on those publishers' websites. 11 12 And it's that contextual look and feel, that 13 automatic process, which enables Google to do it on a 14 mass scale. 15 And when I talk about scalability, we're talking about able to take those publishers' websites 16 and make money for the publishers and Google, because 17 18 those publishers otherwise would not have made money, 19 because all they had was content, and they had no way, 20 because of their size and the many millions of 21 publishers out there -- it was a unique way for publishers and Google to make money. 22 2.3 And that's what my understanding it is. 24 MR. VERHOEVEN: Your Honor, may I come 25 around and use the butcher paper here?

```
THE COURT: Yes.
 1
             (By Mr. Verhoeven) Can you see here?
 2
             I can see the top part. I can stand up, if
 3
  you like.
 5
                  THE COURT: Just move it over a little
 6
  bit closer.
 7
                  THE WITNESS: I tell you what, if I move
 8
   over here, I think we're good.
9
        Q. (By Mr. Verhoeven) Okay. So I think you
10
   talked about three -- did you call them wheels?
11
             Yes, circles or wheels.
        Α.
12
             Okay. So one is the publisher interface?
        Q.
13
        Α.
             The publisher network, yes.
             Publisher network?
14
        Ο.
15
            Well, I call it the automated publisher
        Α.
16
   system.
17
             Okay. So this is the publisher.
        Q.
             And then the other is what?
18
19
        Α.
             The advertisers.
20
             And the third one?
        Q.
21
             Is Google.
        Α.
22
             No. I'm talking about the patents. Features
   in the patents that you think are needed for there to be
23
24
   an acceptable substitute.
25
        A. I can't tell you what's needed, because that's
```

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a technical question. I can just tell you what I
1
  understand --
2
3
        Q. Okay.
        A. -- is the way the system operates and what's
4
5
  taught and what the benefits of doing -- or practicing
  the patent is.
6
       Q. Well, you're -- you're an expert, who has
  provided an opinion on whether there's any acceptable
  noninfringing substitutes, correct?
10
             What my understanding is on them.
            Do you have an opinion on it?
11
        Ο.
            I've told you my opinion is based on
12
        Α.
13
  Dr. Rhyne.
14
       Q. Okay. So this is -- is this the computer
15
  controller?
16
        A. That's what I've heard it referred to. I'm
  not sure if that's the correct term, but it's the Google
17
   interface that links those two wheels.
19
             Well, I want to make sure I have your
20
   understanding, so what would you call this?
             I would just call it the Google system that
21
        Α.
   links both of the wheels.
22
2.3
             I'm talking about the patent, sir.
        Q.
24
            Yes. That's what I'm talking about. But I'm
25
  not --
```

- 1 Q. The patents -- the patents don't say the
- 2 Google system, do they?

- A. I haven't looked at them in a while.
- Q. This is the central controller that manages all this and publishes, right?
- A. I would agree -- I understand that there is an automated computer system at Google that manages the whole process. That's the third wheel I'm talking about.
- Q. Okay. And so the publishers. Then the information the publishers put in it goes here (indicating), right?
- 13 A. Yes.
- Q. And the information the advertisers put in goes here (indicating), right?
- 16 A. Correct.
- Q. Okay. Do you know -- did you know that

  AdSense has a publisher interface and advertiser

  interface and central computer system?
- A. AdSense?
- 21 Q. Yes.
- 22 A. Yes. Yes, of course.
- 23 Q. You did know that.
- 24 A. Yes. AdSense for Content.
- 25 Q. Did you know -- I'm sorry. I misspoke.

Did you know that AdForce has a publisher interface, an 2 advertiser interface, and a central computer system? 3 Not specifically, no. You didn't know that? 4 5 No. I don't know the details -- from a Α. technical standpoint, I don't know the details about 6 AdForce. 8 Q. Okay. Did you know that DoubleClick DART has 9 a publisher interface, an advertiser interface, and a central controller? 10 Well, I knew that DoubleClick had DART for 11 Α. publishers and DART for advertiser --12 13 Q. Did you know --14 -- as an automated management system -- let me 15 finish, please -- as an automated management system. 16 That, I knew. 17 O. You knew it was automated? 18 Α. Yes. 19 Okay. Did you know that AdForce was 20 automated, also? I understood that. 21 Α. 22 And is it your testimony that if these two systems were around and created by others prior to the 23 24 inventors, they would still be noninfringing acceptable

25

substitutes?

- A. I'm sorry. You'll have to repeat that.
- Q. Is it your testimony that if AdForce and
  DoubleClick were out there before the patents, that they
  would still not be an acceptable noninfringing
- 5 substitute?

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8

- 6 A. Oh. That's an issue I have no opinion on.
  - Q. Okay. You're being paid by the hour today?
  - A. For my time, yes.
  - Q. Yeah. \$600 an hour?
- 10 A. Yes.
- 11 Q. Is it true that you've given expert testimony
- 12 on damages in court in 28 different matters in the last
- 13 four years?
- 14 A. Sounds about right.
- 15 Q. Is it true that you've given deposition
- 16 testimony as an expert witness under oath 69 times in
- 17 the last four years?
- 18 A. That sounds about right.
- 19 Q. Is it fair to say you're a professional
- 20 damages witness?
- 21 A. No. I'm a professional -- I'm a professional
- 22 and an expert in patent damages.
- Q. Fair to say you're --
- A. But I've testified on a number of occasions.
- Q. Okay. Now, your expertise is with numbers,

```
right?
 1
 2
       A. Well, it's economics, finance, accounting,
 3
  statistics.
            You're supposed to be pretty good with
 4
 5
  numbers?
 6
        A. Try to be.
        Q. Okay. Now, at your deposition, you were asked
  how much you billed Function Media in this case in
   connection with this matter. Do you remember that
  testimony?
10
       A. Somewhat.
11
12
        Q. You said that you billed somewhere between 150
   and $175,000?
13
            That's what CRA billed.
14
        Α.
15
        Q.
            Okay.
16
        Α.
            That's what my recollection was.
17
            Do you remember that?
        Q.
18
        Α.
            Yes.
19
        Q.
             That was your testimony under oath.
20
        Α.
             Yes. That was my understanding.
21
                  MR. VERHOEVEN: Let's bring up DX demo
  153. No. 153.
22
2.3
          (By Mr. Verhoeven) Do you recognize this
        Q..
  document?
24
25
        A. No.
```

```
It says: Summary of CRA International, Inc.'s
 1
        Q.
 2
   invoices related to Function Media, LLC, versus Google,
 3
   Inc., in this matter.
 4
             Do you see that?
 5
        Α.
             I do.
             And if we pull out the bottom total, the total
 6
 7
   is $524,177.
 8
             Do you see that?
 9
        Α.
             I do.
             So that's off by a factor of over two times
10
   what you said in your deposition, right?
11
            Well, it's a different time period, too.
12
13
             Okay. Your deposition asked through the end
        Q.
   of November, right?
14
15
        Α.
            Yes.
16
        Q. So if you look at this invoice, can you tell
   me what your CRA invoice is worth at the end of
17
18
  November?
19
        A. CRA invoiced --
20
                  THE WITNESS: Can you take the shading
21
   off? Because I can't read it on the screen.
22
        A. CRA invoiced $100,000 between November and
23
   January.
24
            (By Mr. Verhoeven) So let's take off $100,000,
25
   just to be safe, okay?
```

A. Okay. All right.

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- Q. So you testified at deposition that it was 150 to 175, but it's actually 400, right?
  - A. That's what it turns out to be, yes.
  - Q. It's off by a major factor.
- A. Well, yes. It's different. I mean, in other words, what I estimated, based on what I knew or recalled, was different than the total.
- 9 Q. So as a damages expert, at your deposition,
  10 when you testified under oath as to how much you billed,
  11 you were inaccurate by a factor of two, weren't you?
- A. No, I wasn't inaccurate. I just -- I didn't have access to the invoices. I don't work for CRA, so I don't get their invoices.
- Q. Oh, you don't work for CRA.
- A. No, I'm not an employee. I'm a consultant.
- 17 So I don't see any invoices.
- 18 Q. So you don't look at them to see if they're
  19 accurate --
- 20 A. They're not --
- 21 Q. -- if they accurately reflect your time?
- A. I have -- no, I do not. I don't get to see
- 23 any invoices CRA sends out. That's a CRA matter.
- 24 That's why I don't know anything about these invoices.
- Q. Okay. So you're -- you were unable to get

access to information to tell us accurately at your 1 2 deposition how much CRA billed. 3 Is that your testimony? No. My testimony is, what I recall that Α. 4 5 somebody had told me we had billed that fall, was in the range of 175,000 or so. That's what I recalled, because I had never seen the invoices. 8 Q. And that was off by a factor of two. 9 Well, they've invoiced more, yes. 10 Q.. Okay. MR. VERHOEVEN: No further questions, 11 12 Your Honor. 13 THE COURT: Redirect? 14 MR. NELSON: Yes, sir. 15 REDIRECT EXAMINATION 16 BY MR. NELSON: 17 Q. Let me take that last point first. 18 Α. Sure. 19 And then we'll go out, and we're going to hit 20 actually, I think, every single major point that he 21 discussed during the next few minutes or so, hopefully, even before lunch. 22 2.3 Α. Okay. 24 First, the bills that he just put up -- I 25 think you just testified to this, but you do not see

these bills, correct? 1 2 I've never seen these bills. In fact, I've 3 never seen that list. At your deposition, you specifically said that 4 5 you didn't know for sure what had been billed, right? Correct. 6 Α. 7 Okay. And I don't mean to quote exactly on Q.. that, but you've made clear that you were not trying to give an exact number on it, correct? 10 Correct. And I also explained in my deposition that I don't work -- I'm not an employee of 11 CRA, so I don't see their information. 12 13 Okay. At that time, your bills were 0. 14 significantly lower than \$100,000 at the time, correct? 15 Α. Yes. 16 So any difference would be what CRA, a company Q. you don't work for, had billed; is that right? 17 18 Α. Correct. 19 Okay. Generally, what's your understanding --20 in terms of your rate, is your rate higher or lower than 21 Google's damages expert? 22 Oh, it's a lot lower. Α. 2.3 Okay. In terms of a -- sort of a monthly

average of -- of what you and your firm -- or your

consulting firm has billed compared to Google's expert

24

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and his damages experts, has -- on a monthly basis, has
2
  Google billed for more -- or Google's damages expert
  billed more for its damages consulting than you have?
3
                  MR. VERHOEVEN: Objection, leading,
4
5
  foundation.
                  THE COURT: Overruled.
6
             From my recollection, they billed a little
  more. Excuse me. They billed more.
9
        Q.
             (By Mr. Nelson) And their period, actually,
10
   was only over a four-month period, right?
            Yes. I've been working on this for a year and
11
        Α.
   a half.
12
13
        Q. And you're aware, actually, Google had another
   damages expert before their current damages expert got
14
  hired, and they billed for that case, too, right?
15
16
                  MR. VERHOEVEN: Objection, leading.
                  THE COURT: Sustained.
17
18
             (By Mr. Nelson) Are you aware of whether
        Q.
   Google had another damages expert before the expert they
20
   had just retained a few months ago?
21
        Α.
             I learned that during this case, yes, that
   they ended up with two different experts.
22
           And any amount that Google's own damages
2.3
24
   expert billed, that is already more than you, wouldn't
25
  even include the other amount that Google's first
```

```
damages expert, who was not testifying at trial, has
   billed, correct?
2
3
                  MR. VERHOEVEN: Objection, leading.
                  THE COURT: Sustained.
 4
5
             (By Mr. Nelson) Would any amount include, as a
   comparison, what Google had -- or Google's first damages
6
   expert had billed to Google?
8
        Α.
             Yes. In other words, you had the combined
9
   total of what Mr. Wagner and his company billed, plus
10
   what Mr. -- I'm trying to remember his name, but the --
   the other consulting firm, Keith Ugone's firm, billed to
11
   Google. You'd have to take the combined total to
12
13
   represent their effort on damages.
14
             Did you learn, one way or the other, why
15
   Google changed damages experts here?
16
             No, I don't know why.
        Α.
             You were questioned about some -- I think
17
   there were four patent licenses that -- or patent
19
   technology agreements that Mr. Verhoeven put in front of
20
   you, and I'd like to go through every single one of
   those with you.
21
22
             First, let me start from the beginning as we
   get to the substance here.
2.3
24
             Did anything in Mr. Verhoeven's cross-
25
   examination change your opinion that it would be a
```

reasonable royalty of 12 percent? 1 2 Α. No, nothing changed. 3 Okay. Earlier yesterday in your direct examination, we saw a clip of Mr. Chen testifying over 5 and over again: I don't know; I don't know; I don't 6 know. 7 Do you recall that testimony? 8 MR. VERHOEVEN: Objection, 9 characterization. THE COURT: Sustained. 10 11 (By Mr. Nelson) Did you recall Mr. Chen's testimony yesterday? 12 13 Oh, yes. I read his deposition. Α. 14 And you -- and also during --0. 15 And the testimony yesterday. 16 Can you please recap for the jury what they Q.. saw yesterday on that to remind the jury of that? 17 18 Well, he was asked about a number of licenses 19 and some transactions, like the Carl Meyer agreement, 20 and he didn't know anything about them. He knew very 21 little about them. 22 What is the importance, what is the relevance -- if a company cannot explain what licenses 23 24 are about, how does that affect your analysis? 25 Well, I wasn't at any of those transactions, Α.

so I have to rely on information, such as information 1 2 from Google's own witnesses and corporate representatives, who testified under oath, about the 3 subject matter of those transactions. 4 5 And if you don't have -- you, as an expert, damages expert or economic expert, don't have 6 information that you can get access to as to who the parties were to the transaction, why the transaction was 9 executed, in other words, what was the business purpose, 10 what were the reasons associated with it, you can't put it in any context, and it's a meaningless analysis. 11 12 Let me try to give you a hypothetical and see Q. what you think about that. 13 14 Α. Sure. 15 Is it a fair comparison, if I go to a used car 16 lot and I buy the rattiest, worst car on that lot for \$750, and then -- can I say that, because I bought that 17 18 car for \$750, that, therefore, a Rolls Royce is worth 19 \$750? 20 No, of course not. You need --Α. 21 Why not? 0. 22 Well, you need to know the details. 23 dealing with a spanking new Rolls Royce, which has got a 24 lot of bells and whistles to it, and you've got a 10-,

15-year-old car that have dings and dents in it, and for

```
all I know, may have bald tires.
1
             But you have to understand what's in that used
2
3
   car and what's in that new car in order to make an
4
   analysis of that.
5
             And did Google -- was Google able to give any
   of the analysis, the car facts, for what it was about?
6
             In those transactions, no.
8
             Okay. For example, on the Carl Meyer patent,
        Q.
   we heard yesterday -- did Google even know who Carl
10
  Meyer was?
11
        Α.
            No. Google did not know who Carl Meyer was.
12
             You did independent research about this
        Q.
   transaction, correct?
13
14
        Α.
             Yes.
15
             Did you find that there was actually a
16
   relationship, one way or another, between Carl Meyer and
17
   Google?
18
        Α.
            Yes.
19
             And what was that relationship?
20
        Α.
             One of the inventors on the Carl Meyer's
   patents was actually an employee of Google at the time
21
22
   of the December 2008 agreement.
2.3
        Q. And, Mr. Bratic --
24
                  MR. VERHOEVEN: Objection. May I
25
   approach?
```

```
THE COURT: Yes.
1
                  (Bench conference.)
2
3
                  MS. CANDIDO: We have already made it
   clear at the argument on this motion that this purported
4
5
  employee of Google has never worked for Google. And yet
   Counsel is continuing to raise that as a fact. It's not
6
   in evidence, and it's not correct.
8
                  MR. NELSON: They can certainly do
9
   recross on the fact that what is in the public record is
10
  not accurate, but the public record states he's an
11
   employee.
12
                  THE COURT: Well --
13
                  MR. VERHOEVEN: Your Honor --
14
                  MR. NELSON: And he's relied on that, and
15
   they --
16
                  MS. CANDIDO: Excuse me. Mr. Verhoeven
17
   was pointing out to me that we're not stuck with the
18
   terms of the agreement, but yet Function Media's counsel
19
   is going beyond the terms.
20
                  THE COURT: Well, I'm going to overrule
21
   the objection. You can call a witness, if you want to,
   to testify about whether this person was actually a
22
  witness (sic) or not.
23
24
                  But based on what's represented as being
25
  in the public record, I'm going to allow -- I'm going to
```

```
allow this line of testimony.
1
2
                  Overruled.
3
                  (Bench conference concluded.)
             (By Mr. Nelson) Mr. Bratic, in the public
4
5
   record, you've seen evidence that there is a connection
  between Carl Meyer and Google, right?
6
7
        Α.
             Yes.
8
        Q. And this license -- Mr. Verhoeven glossed over
   this fact, but what -- this transaction was how long
10
  after this case actually was filed for suit?
11
            About a year and a half.
        Α.
            Okay. In fact, it was, what, December 18th,
12
        Q.
13
   2008; is that right?
14
            Right. And the lawsuit was filed in July
        Α.
15
   2007.
16
             And is it possible that there was litigation
        Q..
   between the parties?
17
             It's possible.
18
        Α.
19
        0.
             Is it --
20
             I don't know.
        Α.
21
        0.
             Is it possible that there was an agreement
22
   between the parties to buy at a low number?
2.3
             It's possible.
        Α.
24
             You just don't know.
        Ο.
25
            No, I don't.
        Α.
```

- Q. And Google doesn't know.
- A. And Google does not know.
- Q. Okay. Or at least in this case, Google doesn't know?
- A. Well, put it this way: Nobody at Google has said anything about it, that they know anything about it.
  - Q. It's certainly not in the record, right?
- 9 A. Correct.

1

2

3

4

- Q. Okay. And let's go to -- oh, I'm sorry. One other point on the Carl Meyer patent. And I want to -- you mentioned this before, but this is, I think, relevant to all the patents.
- Part of your analysis is the fact that there
  is no design-around; is that a fair --
- 16 A. Correct.
- Q. Okay. Do you know, for example, how easy it would be for Google to design around these licenses that they showed us?
- 20 A. No, I don't.
- 21 Q. Okay.
- A. Well, I do know that in the VoiceAge
  transaction, Google -- one of the negotiating points
  Google had in its favor that it went back to VoiceAge
  on, was that they had a design-around for that codec.

```
And we'll get to that in a second, but with
1
        Q.
2
  respect to Carl Meyer --
3
        Α.
             Right.
4
             -- we don't know anything.
5
        Α.
             We don't know.
             We don't know whether --
6
        Q.
7
                  THE COURT: Excuse me.
8
                  MR. VERHOEVEN: I'm sorry to interrupt.
9
   I'd like to be able to see, Your Honor, if I could.
10
                  THE COURT: Back up just a little bit.
11
                  MR. VERHOEVEN: Thank you.
12
                  MR. NELSON: Sorry.
13
            (By Mr. Nelson) We don't know, for example,
        0.
14
  whether, based on these I-don't-know answers, Google
15
   even practices these technologies and uses these
  inventions.
16
17
        A. Yeah. There's no way to know if Google even
  uses them.
18
19
           Okay. Now, do we even know whether they're
  related to AdSense?
2.0
21
        Α.
            No.
22
            Okay. Let's go to -- about the VoiceAge.
        Q.
2.3
                  MR. NELSON: And let's put up Plaintiff's
  Exhibit 313.
24
25
        Q. (By Mr. Nelson) We've seen this document a
```

lot. 1 2 Α. Yes. 3 Mr. Chen, Google's corporate representative, the person who spoke for Google on licensing, is --5 what, Mr. Bratic, in this document allows you to state that the design-arounds and the ability to design around a particular patent is important? 8 Α. Well, you can see the last line on the bottom 9 of this document where it's showing on the screen. 10 The only leverage we have is that we have another codec. 11 12 So this is Google's analysis that they have an 13 alternative, they have a substitute, to the VoiceAge 14 technology. So they can avoid -- they can leave it; 15 they can avoid the VoiceAge patent. They don't have to 16 take a patent license from VoiceAge, because they have 17 an alternative. 18 And, first of all, let me ask you a basic Q.. 19 question about VoiceAge. 20 Α. Yes. 21 That concerned phones? 0. 22 Α. Yes. 2.3 Are phones part of the relevant field here? Q. 24 Α. No.

Does Mr. Wagner, Google's expert, agree that

25

Q.

phones are not part of the relevant field here? 1 Yes. 2 Α. 3 And part of your analysis of analyzing relevant licenses, are you supposed to look at the 5 relevant field here? Α. Yes. 6 7 Q. Okay. Now, did you review and rely on Mr. Chen's deposition testimony about whether there was 9 a design-around anywhere? 10 Α. Yes. 11 Q. Okay. 12 MR. NELSON: Let's go to Page 131 of 13 Mr. Chen's deposition. Let's go to Line 16 first. 14 Q. (By Mr. Nelson) This is -- you see, I asked 15 the question, and then what is his answer? 16 It says: Actually, what we did was -- it's Α. interesting. In this particular deal, we actually 17 18 developed a workaround. We actually have a new -- our 19 own codec. So those -- for those phones, we're not even 20 using AMR. 21 Okay. And Mr. Verhoeven, if you remember, talked about how there were two big corporations that 22 were at issue, and therefore, perhaps that the license 23 24 should be higher. 25 Mr. Bratic, if two big corporations get

```
together jointly, are you aware generally whether there
 1
 2
  are laws in place that these corporations have to act --
 3
  that they can't violate the antitrust laws, for example?
        Α.
 4
            Yes.
 5
             And, generally, do they have to impose
  reasonable and nondiscriminatory forums on license
 6
   agreements?
 8
        A. Yes.
 9
        Q.
             Okay.
10
                  MR. NELSON: Let's go to the top of that
11
   same page.
12
        Q.
            (By Mr. Nelson) And this is Mr. Chen's
13
   testimony, too?
14
        Α.
             Yes.
15
             Okay. What is he saying about the terms of --
16
                  THE COURT: And, Counsel, you need to
  slow down a little bit.
17
18
                  MR. NELSON: Excuse me, Your Honor.
19
             (By Mr. Nelson) What did Mr. Chen testify to
20
   about the terms and the reason why the terms were what
   they were in the VoiceAge agreement?
21
22
             Well, because he said with -- well, in
23
   addition to the fact that Google had a design-around, he
24
  said, with respect to VoiceAge, because there's a
25
  standard, there's noncompetitive and nonpreferential
```

treatment laws, that they have -- they, being
VoiceAge -- have to abide by, that there's not much
deviation from the standard contract.

In other words, they pretty much have to give it on standard terms to everybody who wants a license.

- Q. How would this differ from a hypothetical negotiation?
- A. There are no standards and there's no -there's no standards governing -- and what I mean by
  standards is, there's no legal standards or law
  standards regarding technology standards that are
  subject to the hypothetical negotiation.
- So neither Function Media nor Google have to deal with the issue about having to give licenses on a nondiscriminatory or other basis to anybody.
  - Q. And when Mr. --

- MR. NELSON: Let's go back to PX313.
- Q. (By Mr. Nelson) When Mr. Chen said, take it or leave it, he was -- what was he recognizing here?
  - A. He was recognizing that the terms of that agreement had this standard provision, that it was a standard agreement across the industry.
- Q. And what was he recognizing in terms of the ability of a design-around?
- 25 A. He was recognizing there was one. In fact, we

just saw it in his deposition. They actually achieved a design-around.

- Q. Okay. And with respect to the Hewlett-Packard agreement, the third license they talked about --
  - A. Yes --
  - Q. -- was that a cross-license?
- 7 A. -- it was.

- Q. What, in your opinion, makes a cross-license different from a regular bare patent license?
- A. Yeah. A cross-license is what it says. A cross-license, each party is giving something to the other side. Hewlett-Packard was giving something to Google, and Google was giving something to Hewlett-Packard.

And Hewlett-Packard -- Google has still agreed to pay, even in that cross-license -- after Google got something from Hewlett-Packard and Hewlett-Packard got something from Google, Google agreed to pay running royalties. They just capped it at \$20 million.

What you can't do from a cross-license, at least not from the information that Google provided in this case, is unravel that cross-license to find out what Google -- I mean, what Hewlett-Packard would have charged Google if there had been no cross-license.

25 | In other words, if Hewlett-Packard hadn't received

```
anything from -- any technology rights from Google, you
  don't know what Hewlett-Packard would have charged in
3
  the alternative.
             And was that in the same relevant technology
4
        0.
5
  field anyway, that Hewlett-Packard agreement?
             It had to do with search technology. They
6
   excluded it.
8
        Q.
             Yeah, they excluded it.
9
             And was it about e-mail?
10
        Α.
             Yes. It had to do with e-mail technology.
11
             Was it -- was it a relevant license in this
        0.
12
  field?
13
        Α.
            No.
14
             Now, Mr. Verhoeven spent a fair amount of time
15
   asking you questions about whether Function Media was an
   ongoing business where they had developed software.
16
17
             Let me ask you, are you aware of what Google's
   own damages expert's opinion is on whether it even
19
  matters if they completed this product?
20
                  MR. VERHOEVEN: Objection, Your Honor.
   The witness -- he's asking the witness to characterize
21
   testimony that hadn't occurred yet.
22
2.3
                  THE COURT: Overruled.
24
             I'm sorry. You're going to have to repeat the
25
  question.
```

```
1
             (By Mr. Nelson) Are you aware, Mr. Bratic, of
        Q.
2
   whether Google's own damages expert states that it does
  not matter whether Function Media has attempted to
3
   commercialize the invention, in terms of setting the
5
  royalty rate here?
6
             Yes, I'm aware. Mr. Wagner, his report said
7
   it did not matter.
8
             Okay. And are you aware that Mr. Wagner,
        Q.
9
   Google's own damages expert, has stated that it does not
10
   matter whether a company is large or small in terms of
   setting the rate for a reasonable royalty negotiation?
11
12
        Α.
             Yes.
13
             Okay. Thank you.
        Ο.
14
                  MR. NELSON: Your Honor, I have actually
15
   about 10 more minutes worth of cross -- five or ten
   minutes worth of cross-examination (sic). I'm happy to
16
   try to continue it now. I know we're right at noon.
17
18
   I'm at the Court's pleasure.
19
                  THE COURT: Well, as much as I would like
20
   to be through and move on to another witness, I think
21
   we'll break for lunch, because I anticipate there will
   be some additional recross.
22
2.3
                  Ladies and Gentlemen, be back at 1:15.
   Have a nice lunch, and don't talk about the case.
```

You're excused.

```
COURT SECURITY OFFICER: All rise.
 1
 2
                   (Jury out.)
 3
                   THE COURT: Recess till 1:15.
 4
                   Stay behind the podium so he can see me,
 5
   okay?
 6
                   MR. NELSON: Yes, sir.
 7
                   THE COURT: I asked you to do that once
 8
   for me --
                  MR. NELSON: Oh, I'm sorry.
 9
10
                   THE COURT: -- okay?
11
                   MR. NELSON: Yes, sir.
12
                   (Recess.)
13
14
15
16
17
18
19
20
21
22
23
24
25
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2	
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